

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 PHOENIX LIGHT SF LIMITED,
4 *et al.*,

Plaintiffs,

5 v.

14 Civ. 10103 (JGK)

6 DEUTSCHE BANK NATIONAL TRUST
7 COMPANY, *et al.*,

Defendants.

Oral Argument

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9 COMMERZBANK AG,

10 Plaintiff,

11 v.

15 Civ. 10031 (JGK)

12 DEUTSCHE BANK NATIONAL TRUST
13 COMPANY, *et al.*,

Defendants.

14 -----x

New York, N.Y.
August 3, 2021
10:00 a.m.

16 Before:

HON. JOHN G. KOELTL,

District Judge

18 APPEARANCES

19 WOLLMUTH MAHER & DEUTSCH LLP
Attorneys for Plaintiffs

20 BY: DAVID H. WOLLMUTH
JOHN R. HEIN

21 -and-

22 CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO
BY: JAY S. HANDLIN

23 MORGAN LEWIS & BOCKIUS LLP
Attorneys for Defendants

24 BY: KEVIN J. BIRON
MICHAEL S. KRAUT
25 BRYAN P. GOFF

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(Case called; appearances noted)

THE COURT: Good morning, all. Please be seated.

All right. I have two sets of motions. There are the defendants' motions for summary judgment, and I have the plaintiffs' motion for partial summary judgment. I'm familiar with the papers. I'll listen to argument.

Because of these conditions, we're asked to have everyone masked. But if everyone is vaccinated, they don't have to be six feet away from each other in the well of the courtroom. Please keep your voices up. It's not so easy to hear you all, so keep your voices up. Speak distinctly. Do the best you can with the masks. If at any time anyone can't hear me, just raise your hand.

Let's start with the defendants' motion for summary judgment.

MR. BIRON: From the podium, your Honor?

THE COURT: Yes, you can speak from the podium.

MR. BIRON: Good morning.

THE COURT: Good morning.

MR. BIRON: Your Honor, these lawsuits are the most recent wave --

THE COURT: Make sure to speak somewhat slowly for the court reporter.

If at any time the court reporter can't hear or is bothered by how quickly the lawyers are speaking, just let me

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1 know.

2 Mr. Goff.

3 MR. BIRON: Mr. Biron.

4 THE COURT: Mr. Biron. OK.

5 MR. BIRON: In these cases, plaintiffs attempt to hold
6 the RMBS trustees responsible for losses on mortgage loans in
7 the RMBS trusts that arose in connection with the financial
8 crisis. Courts have now decided summary judgment motions in
9 seven of these cases. In each decision, the court granted the
10 trustee's motion, in whole or in part, and denied any motion
11 filed by plaintiffs in its entirety. The same result is
12 compelled here.

13 For example, in Commerzbank's case against U.S. Bank,
14 the court granted the trustee's summary judgment motion in
15 part. The court held that all claims subject to Germany's
16 three-year statute of limitations --

17 THE COURT: That was Judge Pauley's decision?

18 MR. BIRON: Yes, your Honor.

19 THE COURT: OK. By the way, are the seven cases
20 listed somewhere in your brief?

21 MR. BIRON: I'm not sure if they're listed in one
22 place, but I'm happy to list them now if that would be helpful.
23 I mean I believe they're all cited in the brief or in the
24 notices of supplemental authority, your Honor.

25 THE COURT: Yes, I know. I've been serially gifted

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1 with notices of supplemental authority over the years, so list
2 them now with the cites. I know Judge Pauley's decision.

3 What are the others?

4 MR. BIRON: So, the others are *American Fidelity*
5 *Assurance Company v. Bank of New York-Mellon*, 2020 WL 3790710.
6 That decision's from the Tenth Circuit affirming *American*
7 *Fidelity Assurance Company v. Bank of New York-Mellon* and the
8 cite for the lower court, district court decision is 2018 WL
9 6582381.

10 The next case is the one that I just referenced, which
11 is *Commerzbank v. U.S. Bank*. The cite for that is 2020 WL
12 2036723. In addition, reconsideration of that decision was
13 denied at 2021 WL 603045.

14 The next decision is *Phoenix Light v. U.S. Bank*. The
15 cite for that is 2020 WL 1285783, and reconsideration of that
16 decision was denied at 2020 WL 4699043.

17 The next decision is *Fixed Income Shares Series M v.*
18 *Citibank, N.A.* The cite for that is 314 F.Supp.3d 552.

19 The next decision is *Phoenix Light v. Bank of New*
20 *York-Mellon*. The cite for that is 2017 WL 3973951.

21 The next cite is *Policemen's Annuity and Benefit Fund*
22 *of the City of Chicago v. Bank of America*. The cite for that
23 is 2013 WL 5328181.

24 And finally, the seventh decision is *Oklahoma Police*
25 *Pension and Retirement v. U.S. Bank*. The cite for that is 986

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1 F.Supp.2d 412.

2 THE COURT: OK.

3 MR. BIRON: As I was noting, in Judge Pauley's
4 decision in Commerzbank's case against U.S. Bank, he held all
5 claims subject to Germany's statute of limitations were
6 time-barred. He held plaintiffs had no standing with respect
7 to certificates that had been sold before the case was
8 commenced, and he also held that absent explicit language in
9 the governing agreement, the trustee had no pre-EOD duty to
10 enforce any repurchase claims. These holdings are equally
11 applicable here.

12 Similarly, in Phoenix Light's case against Bank of New
13 York, the court denied plaintiff's motion in its entirety and
14 granted the trustee's motion as to most of plaintiff's claim.
15 The court held that plaintiffs had failed to adduce the
16 necessary loan-by-loan and trust-by-trust evidence to survive
17 summary judgment, and again, plaintiffs' claims here suffer
18 from those same fatal flaws.

19 As we mentioned at the outset, your Honor, my partner
20 Michael Kraut and I are going to be walking through the
21 specific reasons why the Court should grant the defendants'
22 summary judgment motion.

23 THE COURT: By the way, when you're on loan by loan
24 and trust by trust, could you explain to me in greater detail
25 what the difference is between phase 1 discovery and phase 2

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1 discovery. Isn't some of the material that would relate to
2 loan-by-loan and trust-by-trust issues reserved for phase 2
3 discovery?

4 MR. BIRON: No, your Honor, I don't believe so. And
5 the reason is because for pre-EOD claims, plaintiffs need to
6 show that the trustee had loan-specific notice and knowledge of
7 an alleged representation and warranty breach. And so in phase
8 2 is where we're going to do loan re-underwriting, and that's
9 to go get discovery about loans that are in the trust and see
10 if they violated the rep and warranty, the representations and
11 warranties that were made about them by the warrantors.
12 However, for plaintiffs to survive summary judgment, they need
13 to come forward with loan-specific evidence not only that there
14 was a breach of a representation and warranty of trust but that
15 the trustee actually had notice of the breach.

16 And so that's part of discovery that took place in
17 phase 1. And similarly, for the trust by trust, which is
18 normally related to event-of-default issues, again, that was
19 the subject of phase 1 discovery. And for plaintiffs to
20 survive summary judgment, they need to come forward with
21 trust-specific evidence that the trustee had actual knowledge
22 or, under some governing agreements, written notice of an event
23 of default. And as we'll show today, your Honor, in the vast
24 majority of cases, plaintiffs have failed to meet that burden.

25 So as we were saying, is that Mr. Kraut and I will be

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1 walking through the specific reasons why the Court should grant
2 defendants' motion and deny plaintiffs' motion. To the extent
3 we don't address a particular issue raised in the briefing, our
4 intention is to rest on the papers. I will first be addressing
5 certain of the gating legal issues, such as standing and
6 statute of limitations, before I move on to plaintiffs'
7 pre-event-of-default claims, and Mr. Kraut will then address
8 plaintiffs' post-event-of-default claims.

9 So, to start with standing, plaintiffs have not
10 presented evidence sufficient to raise a triable issue of fact
11 as to their standing to assert claims concerning certificates
12 they sold before these lawsuits.

13 THE COURT: I'm sorry. Concerning what?

14 MR. BIRON: The certificates that were sold --

15 THE COURT: Oh, all right.

16 MR. BIRON: -- before the lawsuits.

17 THE COURT: Got it.

18 MR. BIRON: There is no dispute that none of the
19 buyers agreed that the plaintiffs would retain any litigation
20 claims. Thus, to survive summary judgment, plaintiffs were
21 required to present evidence that raises a triable issue on
22 whether the sales were governed by the laws of a jurisdiction
23 under which claims against a trustee do not automatically
24 transfer to the buyer. Plaintiffs have not met that burden.
25 If anything, the evidence plaintiffs presented shows the sales

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1 were governed by New York law under which claims against the
2 trustee automatically transfer to the buyer. To determine
3 governing law --

4 THE COURT: Wait. Could I just stop you for a moment
5 there.

6 The thrust of your argument, as I understand it, is
7 the plaintiffs have not provided sufficient information about
8 the purchasers of the sold certificates so that the conflict of
9 law, choice-of-law analysis to be applied under New York law
10 simply can't be done. So because it's a standing issue and the
11 plaintiffs haven't established the residence of the purchasers,
12 the plaintiff group, Judge Pauley appears, in his decision, to
13 have said that because the certificates were registered with
14 the DTC in New York, New York law would apply and the
15 plaintiffs therefore lacked standing. So my question is what
16 position do you want me to take: the position that I got from
17 your papers or Judge Pauley's decision?

18 MR. BIRON: Your Honor, I believe the positions are
19 consistent with one another, and I do believe that the absence
20 of information and evidence about who the actual buyers are is
21 sufficient. But that being said, is that the evidence
22 presented by plaintiffs here, again, shows that all the
23 securities are registered in the name of the DTC in New York.
24 And so, yes, your Honor, I would ask for a finding that in
25 light of the evidence presented here, either is insufficient to

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1 demonstrate that they retain standing, and the reason for that
2 is because it appears it is governed by New York law under
3 which claims were automatically transferred -- I'm sorry.

4 THE COURT: I'm sorry. You said two separate things,
5 which are not the same. You said that the certificates are
6 governed by New York law and we don't know the residence of the
7 purchasers. Those are two somewhat different positions, and I
8 saw from your papers that not all of the certificates that were
9 sold were registered with the DTC. Some of them are, most of
10 them are, but not all.

11 MR. BIRON: That's incorrect, your Honor.

12 THE COURT: Hold on one second, please.

13 OK.

14 MR. BIRON: So, to respond to your question, your
15 Honor, the evidence shows that all sold certificates were
16 registered with the DTC in New York, and I refer the Court to
17 plaintiffs' responses to paragraph 41 of our Phoenix Light 56.1
18 and paragraph 44 of our Commerzbank 56.1, including the trade
19 tickets that are cited in those paragraphs which show the sales
20 settled to the DTC in New York.

21 And so in response to your question, your Honor, is
22 that yes, I would like a finding consistent with the ruling by
23 Judge Pauley in *Commerzbank v. U.S. Bank* that given the DTC's
24 involvement, identical involvement as in Commerzbank, this
25 meant that the transactions occurred in New York and were

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1 governed by New York law.

2 THE COURT: OK. Am I right that that is not the
3 position that you had taken in your original papers? Because
4 those papers were drafted before Judge Pauley's decision.

5 MR. BIRON: Correct, although I do believe that the
6 general position that we took, that plaintiffs could not come
7 forward with evidence showing that the sales were governed by
8 the law of a jurisdiction where the claims didn't automatically
9 transfer --

10 THE COURT: Yes, I know.

11 MR. BIRON: But yes, your Honor.

12 THE COURT: I thought it was a simple question.

13 In your papers, you took the position the plaintiffs
14 have not shown the residence of the purchasers, and because we
15 don't know that, the plaintiffs haven't borne their burden, and
16 they lack standing with respect to the sold certificates.

17 Could you put your mask up.

18 MR. BIRON: Sorry, your Honor. Yes.

19 THE COURT: Thank you.

20 And then along came Judge Pauley's decision, and you
21 would rather have me follow Judge Pauley, rather than the
22 position that you had taken in your brief.

23 MR. BIRON: Yes, your Honor.

24 THE COURT: OK. Fair enough.

25 MR. BIRON: The next category of claims where

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1 plaintiffs do not have standing relates to certain certificates
2 at issue that plaintiffs never held. I would just simply refer
3 the Court to pages 4 through 6 of our reply brief with respect
4 to that argument.

5 And the last category of claims relates to
6 certificates that were issued by the IMM 2005-7 trust. And
7 what that trust agreement provides is that investors such as
8 plaintiffs do not have standing to bring any claims absent
9 consent of the insurer of the senior certificates, which was
10 *Ambac*.

11 There is no dispute that *Ambac* never consented to this
12 action, and in response, plaintiffs assert that under the
13 relevant agreement that consent condition was eliminated when
14 *Ambac* filed for bankruptcy. However, your Honor, that argument
15 fails because the court overseeing *Ambac*'s receivership held
16 that those contract clauses were unenforceable *ipso facto*
17 clauses.

18 THE COURT: Did the decision from the Wisconsin court
19 mean that the clause was forever invalid or was stayed until
20 the conclusion of the bankruptcy or reorganization for *Ambac*?

21 MR. BIRON: My understanding --

22 THE COURT: Could I just finish.

23 MR. BIRON: I apologize.

24 THE COURT: Because it seems unusual for a
25 reorganization court to say that a provision that required

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1 approval was invalid rather than that it was simply stayed
2 until the conclusion of the reorganization. That's my
3 question.

4 MR. BIRON: So, my understanding is that as part of
5 the receivership, the Wisconsin court held that those
6 provisions are invalid, and I believe that they remain invalid,
7 and my understanding is that because *Ambac* continues to have
8 obligations on the monoline insurance policy, that, you know, I
9 believe when it comes out of the reorganization --

10 THE COURT: Keep your voice up.

11 MR. BIRON: -- those provisions will continue to be
12 inapplicable. I would ask the Court that -- I would be happy
13 to go and revisit the *Ambac* docket to see if there's further
14 guidance at this point because I do have to admit that I have
15 not reviewed the docket in preparation for this argument today.

16 THE COURT: OK. You cited, I think, several other
17 courts that have recognized the decision of the reorganization
18 court. Do those decisions give any light on the question of
19 whether that provision that we're talking about was stayed or
20 rendered forever invalid?

21 MR. BIRON: I do not believe that those decisions
22 speak at that level of specificity, but I do believe that they
23 all held that they were invalid, and I just don't think that
24 they placed a time limit as to how long, you know, they would
25 be invalid, based on my recollection of that.

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1 THE COURT: OK. Because the answer to that question,
2 it seems to me, may determine whether, if it simply stayed, the
3 claims that you're talking about should be dismissed or stayed.

4 MR. BIRON: Your Honor, again, my understanding is
5 that because *Ambac* remains liable on the policy, and the whole
6 concept behind this is that because *Ambac* has that exposure,
7 they should be allowed to either essentially control whether
8 the litigation's commenced with respect to that trust -- I
9 believe that they were not only stayed; I believe that they
10 were essentially read out of the contract. But again, with
11 your Honor's -- I would seek an opportunity to go and look at
12 the docket, because I don't want to speak out of turn.

13 THE COURT: Thank you. Sure.

14 There may be other issues that come up in the course
15 of the argument, and anyone can give me a letter, no longer
16 than two pages, on an issue that I bring up that's left open.
17 So both sides, no more than two pages.

18 Thank you.

19 MR. BIRON: I will now turn to plaintiffs' time-barred
20 claims.

21 Under New York's borrowing statute, given that
22 plaintiffs are both nonresidents, they were required to file
23 their claims within the shorter of the applicable New York
24 statute of limitations and the statute of limitations for the
25 jurisdiction where the claims accrued, which is generally the

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1 jurisdiction where the alleged injury was felt. Most of
2 plaintiffs' claims are untimely under one or both of these
3 statutes of limitation.

4 First, most of plaintiffs' claims are time-barred
5 under Germany's three-year statute of limitations. Your Honor
6 has already held on our motion to dismiss in the Commerzbank
7 case that most claims asserted by Germany's Commerzbank in this
8 action are governed, are subject to Germany's three-year
9 statute of limitations. The evidence also establishes that the
10 German statute of limitations applies to the RMBS certificates
11 held by the Phoenix Light securitization, which was created by
12 failed German bank WestLB.

13 To summarize the relevant facts, German bank WestLB
14 originally owned these RMBS certificates. Due to the financial
15 crisis, WestLB caused those certificates to be transferred to
16 the securitization trustee for the Phoenix Light trust in
17 exchange for all beneficial interests in that trust.
18 Thereafter, WestLB and its German successor EAA and WestLB's
19 owners owned all beneficial interests in that trust and bore
20 all losses on the certificates and assets in that trust,
21 including any losses on the RMBS at issue here. Thus, any
22 injury related to RMBS certificates held by the Phoenix Light
23 securitization trust occurred in Germany, and thus, that's
24 where the claim accrued.

25 Now, Germany's three-year statute of limitations

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1 begins to run at the end of the calendar year in which the
2 claim arose and plaintiff either has knowledge of the
3 circumstances giving rise to the claim or would have had such
4 knowledge in the absence of gross negligence.

5 Here, the evidence establishes that plaintiffs had
6 knowledge, or were grossly negligent in failing to have such
7 knowledge, of the circumstances giving rise to their claims in
8 the calendar year ending more than three years before the
9 applicable filing date.

10 Now, we have a few applicable filing dates, and I
11 would refer the Court to our papers on that, because we have
12 some claims -- for example, in *Commerzbank*, the action was
13 originally filed in December of 2015, which makes the German
14 statute of limitations date January 1, 2012, meaning that
15 plaintiffs had to be on notice -- or I'm sorry, had to be aware
16 of the factual circumstances prior to that date. However,
17 Commerzbank amended their complaint in November of 2017 to add
18 additional new claims that do not relate back, and thus, with
19 respect to those claims, the applicable date to test the German
20 statute of limitations is January 1, 2014.

21 THE COURT: This may be difficult for you, but, and if
22 you want to refer me to the specific pages of your brief,
23 you're welcome to, but could you tell me, assuming that the
24 German statute of limitations applies both to the Commerzbank
25 trust and to the Phoenix Light trust, which claims and which

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1 trusts are barred by the statute of limitations and where I can
2 find that in your brief.

3 MR. BIRON: Yes, your Honor.

4 In the *Phoenix Light* decision, the claims that would
5 be barred by the German statute of limitations would be all
6 claims related to the Phoenix Light certificates.

7 THE COURT: I'm sorry. All claims --

8 MR. BIRON: Related to the Phoenix Light certificates.
9 And those certificates -- i.e, the RMBS certificates held in
10 the Phoenix Light securitization -- are identified in one of
11 the exhibits we submitted.

12 THE COURT: Hold on.

13 Could you speak a little more distinctly so that the
14 reporter can get everything. I know it's difficult with the
15 mask.

16 MR. BIRON: Yes, your Honor. I will try.

17 As I said, in *Phoenix Light*, with respect to our
18 German statute of limitation argument, the certificates are
19 defined in our brief as the Phoenix Light certificates, and I
20 will be able to provide your Honor with the exhibit to my
21 affidavit where those certificates are listed. I do not have
22 it at my fingertips at the moment.

23 THE COURT: So all the Phoenix Light certificates with
24 respect to all of the claims, including the 2014 downgrade
25 claims?

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1 MR. BIRON: No, your Honor. Everything except for the
2 2014 downgrade claims. We are making no argument on Phoenix
3 Light or Commerzbank relating to the 2014 downgrade claims on
4 this issue.

5 THE COURT: So at the end of the day, you claim that
6 all claims on the Commerzbank certificates and all claims on
7 the Phoenix Light certificates, except relating to the 2014
8 downgrade claims, are barred under the German statute of
9 limitations.

10 MR. BIRON: Yes, your Honor.

11 THE COURT: OK. All right. And those are listed in
12 which exhibit?

13 MR. BIRON: They're listed in the exhibit to my
14 declaration that was submitted in support of our summary
15 judgment motions, and I will have a cite for you, your Honor,
16 once I get back to counsel's table. I do not have it at my
17 fingertips right now.

18 THE COURT: OK. That also depends on your argument
19 that new claims asserted in the subsequent complaints relate
20 back to the time of the original complaint; yes?

21 MR. BIRON: It is dependent with respect to certain --
22 so, there were additional events of default in 2012.
23 Plaintiffs first added claims alleging that defendants breached
24 their obligations relating to the 2012 events of default when
25 they amended their complaint in 2017. And yes, our Germany

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1 statute of limitations argument related to the 2012 event of
2 default is dependent on a finding by your Honor that those
3 claims do not relate back to the original --

4 THE COURT: Do not relate back. OK. And the reason
5 that they do not relate back, even though they relate to the
6 same trust, is what?

7 MR. BIRON: The reason that they don't relate back is
8 because in the earlier complaints, plaintiffs did not even
9 mention any declared events of default. None of them. They
10 did not allege that plaintiffs -- I'm sorry, that defendants
11 violated any duty in connection with a declared event of
12 default. Their only allegation was that defendants had failed
13 to declare events of default based on alleged servicing
14 breaches. And so this is an entirely new set of circumstances,
15 and we were not on notice of this claim before 2017.

16 THE COURT: I don't recall that Judge Pauley dealt
17 with a similar argument. Did he?

18 MR. BIRON: Judge Pauley did not deal with the
19 relation-back argument, your Honor.

20 THE COURT: Was this beforehand?

21 MR. BIRON: I don't -- I don't know the answer to that
22 question, your Honor. I know that it wasn't dealt with in the
23 opinion.

24 THE COURT: OK.

25 MR. BIRON: But again, in connection with the two-page

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1 letter, I can certainly look at the briefing and answer that
2 question, your Honor.

3 THE COURT: OK. Judge Pauley plainly agreed with you.
4 Are there any other cases directly on point where other judges
5 have dealt with the statute of limitations, applied the German
6 statute of limitations and found similar claims time-barred?

7 MR. BIRON: Judge Pauley's the only judge who has
8 addressed this issue in the context of the RMBS trustee
9 lawsuits.

10 THE COURT: There's also no case that disagrees with
11 Judge Pauley.

12 MR. BIRON: That's correct, your Honor.

13 THE COURT: OK.

14 All right. Thank you.

15 MR. BIRON: Your Honor, I'd like to move on briefly
16 just to touch on -- then there's also two categories of
17 plaintiffs' claims that are time-barred under New York's
18 six-year statute of limitations.

19 The first category, again --

20 THE COURT: Could I just stop you for a moment.

21 The issue with the New York statute of limitations is
22 an issue that I wouldn't have to reach if I agreed with you on
23 the German statute of limitations.

24 MR. BIRON: You would need to reach it because there
25 are some certificates at issue in the Phoenix Light action, for

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1 example, that aren't governed by the German statute of
2 limitations, and so if you decide the German statute of
3 limitations in favor of defendants, that's going to eliminate
4 all claims in the Phoenix Light action relating to the Phoenix
5 Light certificates, but there are other -- I'm sorry, all
6 claims other than those related to the 2014 events of default.

7 But there are other certificates that are at issue in
8 that action, and we don't argue that those claims are governed
9 by the German statute of limitations. And so for those, we're
10 arguing that there are claims that are time-barred under New
11 York's six-year statute of limitations.

12 THE COURT: Which claims in the Phoenix Light case are
13 not barred, you claim are not governed by the German statute of
14 limitations?

15 MR. BIRON: Claims relating to any certificate other
16 than those in the Phoenix Light securitization.

17 THE COURT: Other than?

18 MR. BIRON: Other than those in the Phoenix Light
19 securitization.

20 THE COURT: And are those certificates conveniently
21 listed somewhere?

22 MR. BIRON: They are, your Honor, and when I provide
23 you with the exhibits -- I'm sorry. When I provide you with
24 the exhibit number for the Phoenix Light certificate, I will
25 also provide the exhibit number that identifies all the other

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1 certificates as well.

2 THE COURT: OK. Thank you.

3 MR. BIRON: So, with respect to the New York statute
4 of limitations, your Honor, these relate to the same events of
5 default that we were just speaking about that were first
6 identified in the 2017 amendment, and thus, our argument is
7 again dependent on a finding by your Honor that those claims do
8 not relate back.

9 The other claims that we have demonstrated are
10 time-barred under New York law relate to certain notices of
11 representation and warranty, alleged breaches that the trustee
12 received more than six years before these actions were filed.
13 And with respect to any claim that the trustee breached its
14 duties by not taking action with respect to those notices,
15 they're time-barred because, as I said, the notices were
16 received more than six years before plaintiffs filed their
17 actions.

18 I would like to now turn briefly to the topics of
19 bankrupt warrantors and settled repurchase claims.

20 Plaintiffs do not oppose defendants' motion for
21 summary judgment as to any claims arising from defendants'
22 failure to take enforcement action against a warrantor that
23 filed for bankruptcy more than six years before these cases
24 were commenced. And the reason is, your Honor, anything more
25 than six years before is time-barred, and after they filed for

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1 bankruptcy, the trustees were precluded from doing anything as
2 a result of the automatic stay.

3 I'll briefly touch on settled claims.

4 We've established that with respect to eight of the
5 trusts at issue, defendants settled any claims against one of
6 the warrantors, known as Fremont Investment & Loan, in exchange
7 for millions of dollars.

8 THE COURT: Could I stop you, before we leave bankrupt
9 warrantors.

10 Is there a difference between the parties as to what
11 trusts this argument goes to? Is there a difference between
12 whether there are multiple warrantors and only one warrantor
13 goes bankrupt? And is summary judgment being sought with
14 respect to all trusts with respect to where there are more than
15 one warrantors and only one goes bankrupt?

16 There are some trusts which have a single warrantor
17 and the warrantor goes bankrupt. So what's the scope of the
18 argument for summary judgment?

19 MR. BIRON: So, the scope of the argument is that with
20 respect to a trust that has multiple warrantors and one of them
21 went bankrupt, we are only seeking summary judgment as to
22 plaintiffs' argument that defendants should have pursued claims
23 against the bankrupt warrantor. We are not seeking summary
24 judgment on a trust level. However, there are eight trusts,
25 and they're identified on Goff Reply Exhibit 10, where the only

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1 warrantors were entities that went bankrupt more than six years
2 before the applicable filing date.

3 THE COURT: OK. It is a highly specific claim as to
4 which you are seeking summary judgment. I mean we're dealing
5 with numerous claims with respect to 85 trusts, and you say
6 there's this little piece, one claim relating to eight trusts
7 where there's a single bankrupt warrantor and I should grant
8 summary judgment dismissing that claim even though there are
9 other claims relating to the same trust.

10 MR. BIRON: No, your Honor. That isn't what I said.
11 At least I didn't -- let me clarify if it is what I said.

12 So, there are eight trusts, and they're identified on
13 Goff Reply Exhibit 10, where the only warrantor -- the only
14 warrantor -- is an entity that went bankrupt. And so with
15 respect to those eight trusts, what I'm seeking is summary
16 judgment that defendants did not breach any duty by not
17 pursuing claims against those bankrupt warrantors, and that's
18 for the entire trust.

19 THE COURT: Yes, I understand that, but that's only
20 one claim being asserted with respect to those eight trusts.
21 There are other claims that the plaintiffs say they're entitled
22 to judgment on because the defendant trustee did not pursue
23 other duties with respect to that trust. Isn't that right?

24 MR. BIRON: Well, the plaintiffs' claims generally
25 fall into two different categories. One is a failure, is an

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1 alleged failure by defendants to put back loans that were
2 allegedly breaching reps and warranties to the warrantor. And
3 the other claim, as I understand it, is that they allege in
4 certain circumstances that the trustee should have, perhaps,
5 taken action against the servicers to those trusts. But a
6 finding that the trustee did not violate any obligation to
7 seek, to put back loans with respect to these trusts is a
8 significant ruling in this case and, I think, will have a large
9 impact on the case potentially going forward.

10 THE COURT: But that's different from a statement
11 that, a finding, let's just say with respect to the eight
12 trusts that there is no claim with respect to claims against,
13 or that the trust should have acted against a bankrupt
14 warrantor. You're not saying, I don't think, that there would
15 not be other claims on behalf of that trust simply because
16 there are no claims that the trust could have made against the
17 bankrupt warrantor.

18 MR. BIRON: I mean I think what I'm saying is that
19 with respect to those trusts -- I think we're saying the same
20 thing, your Honor. From what I understand is that any claim
21 that the trustee failed to pursue some type of a repurchase
22 action against those warrantors --

23 THE COURT: Let me put it simply.

24 MR. BIRON: OK.

25 THE COURT: There are eight trusts where the sole

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1 warrantor on the trust is a bankrupt entity. Can I enter
2 judgment in favor of the defendants that the plaintiffs have no
3 claim with respect to those eight trusts because there was a
4 bankrupt warrantor?

5 MR. BIRON: We're not seeking that judgment, your
6 Honor.

7 THE COURT: OK. That was my point. So what actually
8 is the judgment that I'm being asked to enter? I realize you
9 want me to say, and there doesn't appear to be any opposition,
10 that there is no claim that the eight trusts should have
11 pursued claims against the bankrupt warrantor. OK. That, of
12 course, leaves open what other claims the plaintiffs may be
13 asserting on behalf of those eight trusts against others. Yes?

14 MR. BIRON: Yes, your Honor.

15 THE COURT: OK. And so you all are looking forward to
16 a trial before a jury eventually in which these individual
17 claims are picked apart that way?

18 MR. BIRON: Eventually, yes, your Honor, but I think
19 probably more to the point of the summary judgment ruling here,
20 I think that to the extent that the case is limited and what I
21 would call right sized, I think that it increases the
22 possibility that the parties may engage in meaningful
23 discussions about the claims, if any, that remain in the case.
24 And so, you know, I think these are significant claims, and if
25 they're found to be out of the case, which, as you know, there

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1 is no opposition, I think it has a meaningful impact on
2 potentially how the parties would value the case.

3 THE COURT: OK. That's a little like the plaintiffs'
4 argument on their motion for partial summary judgment, that I
5 should go through the case looking at various issues and give
6 what seem like advisory opinions to parts of issues in order to
7 assist the parties. It's a long way away from Rule 56 and
8 granting a judgment even if only on liability. But go ahead.
9 I understand your argument.

10 MR. BIRON: I would just note I think that this is
11 distinguishable. I think this is the issue that was before the
12 *Fixed Income v. Citibank* court, where the court granted summary
13 judgment on a similar set of facts. And again, I would just
14 note that it's unopposed.

15 THE COURT: Yes, I know.

16 MR. BIRON: I'll move on.

17 With respect to the Fremont settlement, these
18 settlements occurred between 2008 and 2010. They occurred
19 after notice to investors. Two of them were approved by a
20 super majority of the investors; that's over 66-2/3 percent.
21 The other one was actually approved by a court order that held,
22 and I quote -- I'm sorry -- held that defendants were
23 "exonerated from liability" with a settlement.

24 As set forth in our papers, plaintiffs' attacks on
25 these settlements are unpled, untimely and baseless. And I

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1 would refer the Court to, you know, the argument particularly
2 at our reply, pages 21 through 23, where we address this.

3 I want to touch briefly, your Honor, on time-barred
4 repurchase claims.

5 THE COURT: I'm sorry. Time-barred?

6 MR. BIRON: Time-barred repurchase claims.

7 So, from time to time defendants would receive a
8 letter from interested parties that would identify specific
9 loans that the parties alleged violated representations and
10 warranties. Plaintiffs allege that defendants breached their
11 duties by not taking action with respect to those loans. The
12 New York Court of Appeals, in the case *Deutsche Bank v.*
13 *Barclays*, has held that for defendant Deutsche Bank National
14 Trust Company in its capacity as RMBS trustee any put-back
15 claims must comply with California's four-year statute of
16 limitations, which begins to run at the closing of the trust.
17 And so what we're seeking a ruling on here is that with respect
18 to any notices that Deutsche Bank National Trust Company in its
19 capacity as RMBS trustee for certain of the trusts at issue, if
20 Deutsche Bank received that notice later than four years after
21 the closing date, Deutsche Bank could not have breached a duty
22 by failing to pursue a repurchase action because under the
23 Court of Appeals ruling any such claim was time-barred.

24 So, I would now like to move on to touch on an issue
25 that is not in our summary judgment briefing. I would just

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1 like to note it briefly.

2 It relates to champerty and it relates to Judge
3 Broderick's decision in Phoenix Light's case against U.S. Bank,
4 where Judge Broderick dismissed the case in its entirety,
5 finding that the assignment of claims to plaintiffs were void
6 as champertous and that plaintiffs lacked both prudential and
7 constitutional standing to pursue their claims. We submitted
8 that in a notice of supplemental authority at ECF 363. That
9 case is up on appeal with oral argument scheduled for September
10 23.

11 We believe that as it relates to standing, your Honor
12 could address it *sua sponte*, but absent guidance from your
13 Honor, what we intend to do and what we would like to do is if
14 the Second Circuit affirms that decision, plaintiffs would be
15 collaterally estopped from challenging it in this case, and so
16 at that point we would seek leave from your Honor to move for
17 judgment on that basis. And again, that's absent any further
18 direction or instruction from your Honor on that issue.

19 THE COURT: Well, you can certainly address it
20 subsequently, but that would only apply to assigned claims,
21 right?

22 MR. BIRON: They're all assigned claims.

23 THE COURT: So it would dispose of the entire case.

24 MR. BIRON: Yes, your Honor.

25 THE COURT: You're certainly welcome to make it in a

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1 supplemental motion.

2 MR. BIRON: Thank you.

3 I'd now like to move on to plaintiffs' claims related
4 to document-delivery failures.

5 As set forth in our papers, these claims are both
6 time-barred and abandoned, and they've already been ruled
7 time-barred by this Court. By way of summary, in defendants'
8 Phoenix Light motion to dismiss, we specifically moved to
9 dismiss these claims as time-barred because the alleged
10 breaches occurred more than six years before the complaints
11 were filed.

12 THE COURT: I thought I ruled on that in the motion to
13 dismiss, and I didn't think that the plaintiffs were pursuing
14 those claims.

15 MR. BIRON: We didn't think so either, your Honor.

16 THE COURT: OK.

17 MR. BIRON: So, we have a ruling on these claims from
18 your Honor that they're time-barred. In the Commerzbank case
19 the plaintiffs amended their complaint, and I refer the Court
20 to the second amended complaint at paragraph 35, to make clear
21 that they were not asserting these claims, and under that
22 assumption is how we litigated the case. And so we believe
23 this record clearly establishes that these claims are
24 time-barred; they're out of the case. And so we would, to the
25 extent plaintiffs argue otherwise, we would ask for, I guess,

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1 recognition of the Court's prior decision.

2 Now, I would like to lastly touch on
3 pre-event-of-default claims related to --

4 THE COURT: Could I stop you, because that was an
5 issue I decided on the motion to dismiss. I also dismissed
6 claims under the Trust Indenture Act and the Street Act. And I
7 didn't see any arguments -- perhaps I missed them -- on these
8 motions relating to any claims under the Trust Indenture Act or
9 the Street Act.

10 Is it just assumed that those are no longer in the
11 case?

12 MR. BIRON: Yes, your Honor.

13 With respect to the applicable sections of the Trust
14 Indenture Act that you ruled upon and the Street Act,
15 plaintiffs are not, have not attempted to pursue those claims
16 further, and they're not addressed in the briefing.

17 THE COURT: OK. Go ahead.

18 MR. BIRON: So, I would like to move on to
19 pre-event-of-default claims related to alleged representation
20 and warranty breaches.

21 As a threshold matter, plaintiffs are entitled to
22 summary judgment -- I'm sorry. Defendants are entitled to
23 summary judgment dismissing plaintiffs' claim that defendants
24 had a pre-event-of-default duty to investigate whether a loan
25 breached representation and warranties absent investor

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1 direction to do so. The governing agreement for each trust
2 provides that defendants' duties are limited to those
3 "specifically set forth in the agreement with respect to the
4 trustee and no implied covenants or obligations shall be read
5 into the agreement."

6 There is no provision in any governing agreement for
7 any trust that imposes a duty on defendants to investigate
8 anything absent direction from a specified percentage of
9 investors, which is normally 25 percent. The absence of this
10 language is dispositive of this issue. Consistent with that
11 contract language, New York's First Department has confirmed
12 that RMBS trustees do not have a duty to "notice to the
13 source," and that's *Commerzbank v. Bank of New York-Mellon*, 35
14 N.Y.3d. 363.

15 In addition, your Honor, numerous witnesses for both
16 Phoenix Light and Commerzbank testified that it was their
17 understanding that RMBS trustees had no duty to investigate
18 absent direction from the requisite percentage of investors.
19 In light of this, of all this evidence, defendants are entitled
20 to summary judgment on that issue.

21 Now I would like to turn to situations -- to the
22 pre-event-of-default duties relating to alleged representation
23 and warranty breaches. So, plaintiffs claim that defendants
24 breached their duty to provide notice of alleged representation
25 and warranty breaches and to enforce put-back claims with

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1 respect to those.

2 Under the governing agreements, the trustee and other
3 specified parties have certain duties if they "discover" or
4 under some agreements receive written notice of material
5 loan-level representation and warranty breaches. The courts
6 that have addressed this issue have uniformly held that to
7 survive summary judgment on a pre-event-of-default
8 representation and warranty claim, a plaintiff cannot rely on
9 generalized proof. Rather, the plaintiff must come forward
10 with evidence that the trustee received trust- and
11 loan-specific notice of alleged representation and warranty
12 breaches.

13 Thus, the gating question is whether plaintiffs have
14 come forward with evidence with respect to the trust at issue,
15 trust- and loan-specific evidence that defendant received such
16 notice. As to the 22 trusts identified on Goff Reply Exhibits
17 12 and 13, the answer is no. Plaintiffs have come forward with
18 no evidence that defendant ever received loan-specific notice
19 of any alleged representation and warranty violation.

20 The next question in this analysis is whether
21 plaintiffs have come forward with any evidence that defendants
22 received trust- and loan-specific notice.

23 THE COURT: Could I get back to the question that I
24 raised earlier about the difference between phase 1 and phase 2
25 discovery. Isn't it possible that that evidence would come

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1 forward in phase 2 rather than phase 1?

2 MR. BIRON: No, your Honor, it is impossible.

3 THE COURT: I'm sorry?

4 MR. BIRON: No. It's impossible.

5 THE COURT: It isn't possible.

6 MR. BIRON: So, discovery in phase 1, plaintiffs had
7 an opportunity, and they did take voluminous discovery of
8 defendants, including whether or not defendants received
9 notice, communications from investors. And again, the issue is
10 not whether there was a rep and warranty violation within, on a
11 loan or trust. The issue at this stage is whether plaintiffs
12 have any evidence that the trustee received notice of an
13 alleged representation and warranty breach.

14 THE COURT: OK. Go ahead.

15 MR. BIRON: So, as I was saying, the next question in
16 the, or the next stage in the analysis is whether plaintiffs
17 have come forward with evidence that defendant received loan-
18 or trust-specific notice of an alleged representation or
19 warranty breach and then failed to give notice to the
20 contractually specified parties.

21 As to all trusts, the answer to that question is no.
22 The evidence shows that each time defendants received such a
23 notice, defendants notified the specified parties. That was
24 their practice. That was their policy. And defendants have
25 not -- I'm sorry. Plaintiffs have not come forward with any

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1 evidence to the contrary. Thus, defendants are entitled to
2 summary judgment on all of plaintiffs' pre-event-of-default
3 notice claims.

4 I refer the Court to paragraphs 93 and 94 of our
5 Phoenix Light 56.1 statement and paragraphs 80 and 81 of the
6 Commerzbank 56.1 statement, where this evidence is set forth.

7 Now, the next question, because there are two claims
8 here, plaintiffs allege that the defendants failed to give
9 notice in the mail, also alleges failed to enforce repurchase
10 obligations against the warrantor. So the next question is
11 whether the relevant agreements that, with respect to the
12 trusts that remain imposed a duty on defendants to enforce any
13 warrantor's repurchase obligations.

14 As to the 37 trusts on Biron Phoenix Light Exhibit 56
15 and Biron Commerzbank Exhibit 56, there's no provision in the
16 governing agreement providing that defendant had any such duty.
17 For the 23 trusts identified on Biron Phoenix Light Exhibit 57
18 and Biron Commerzbank Exhibit 57, the governing agreements
19 provide that defendants only had such a duty if directed to do
20 so by the depositor of the trust, and there is no evidence in
21 the record that that condition was ever met. Thus, with
22 respect to those 60 trusts, defendants are entitled to summary
23 judgment that it did not breach, not have or breach any duty to
24 pursue enforcement action against the warrantor.

25 Now, in an attempt to avoid this result, plaintiffs

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1 argue that the language in the governing agreements whereby the
2 trustee agreed to hold the trust fund and "exercise the rights
3 referred to above" for the benefit of the certificate holders
4 somehow imposed an enforcement duty on defendants, that
5 argument fails for several reasons.

6 First, as I noted earlier, the language in all of
7 these governing agreements provides that prior to an event of
8 default, defendants' duties are limited to those specifically
9 set forth in the agreement. And the language cited by
10 plaintiffs does not specifically impose a duty on the trustee
11 to enforce anything. Rather, reading the agreement as a whole
12 and taking into account well-settled trust law, it's apparent
13 that the "rights referred to above" language was not intended
14 to impose any specific obligation on the trustee. Rather, that
15 language was included because to create a common law trust, the
16 trust agreement must include an agreement by the trustee to
17 hold and use the trust property for the benefit of others.

18 I refer the Court to the authority at page 37 of our
19 reply brief, which includes citation to the restatement (third)
20 of trust.

21 THE COURT: In order to grant you summary judgment on
22 that argument, I would have to determine that the language of
23 the governing agreement is unambiguous.

24 MR. BIRON: Yes, your Honor. And that's what Judge
25 Pauley found in the *Commerzbank v. U.S. Bank* decision.

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1 THE COURT: I'm sorry?

2 MR. BIRON: That's what Judge Pauley found in the
3 *Commerzbank v. U.S. Bank* decision. And I will note that other
4 jurists have come down on the other side of that issue as well.

5 And just to briefly address, to the extent that
6 plaintiffs contend that defendant is collaterally estopped from
7 contesting their interpretation of this language by an order
8 denying Deutsche Bank's motion to dismiss in another RMBS case,
9 that argument fails. Among other reasons, the doctrine of
10 collateral estoppel is inapplicable to an order denying a
11 motion to dismiss, and I would note that in Judge Pauley's
12 decision, which was on summary judgment in *Commerzbank v. U.S.*
13 *Bank*, the court found the opposite. So if anyone here is
14 collaterally estopped, it would be Commerzbank.

15 Your Honor, unless your Honor has any questions about
16 what I just covered, I would turn the podium over to Mr. Kraut
17 to cover the post-event-of-default claims.

18 THE COURT: All right.

19 MR. KRAUT: May I begin, your Honor?

20 THE COURT: Yes. Go ahead.

21 MR. KRAUT: Good morning, your Honor.

22 As my partner Mr. Biron said, I will be speaking about
23 plaintiffs' claims relating to the trustee's alleged
24 post-event-of-default duties and whether certain events of
25 default even occurred. Plaintiffs' post-event-of-default

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1 theories fail for many reasons. I'll walk through three
2 primary points today.

3 No. 1, events of default are specific contractually
4 defined events, and plaintiffs have no admissible evidence that
5 each necessary element of an event of default occurred as to
6 what I'll refer to as the disputed events of default and that
7 the trustee had the requisite knowledge of them;

8 No. 2, even if the Court finds that a disputed event
9 of default occurred, plaintiffs have not proven that the
10 trustee acted imprudently;

11 And No. 3, when undisputed events of default occurred,
12 the trustee acknowledged them and acted as a prudent person.

13 As I'll explain, these points warrant summary judgment
14 for defendants. At a minimum, there are disputed issues of
15 fact that prevent summary judgment for plaintiffs. At this
16 stage --

17 THE COURT: I thought this was your motion for summary
18 judgment.

19 MR. KRAUT: I was going to be addressing these
20 issues -- the evidence on both motions is effectively similar.
21 I don't know. Do we want to --

22 THE COURT: Perhaps I should listen to the plaintiffs'
23 motion for summary judgment, and you can respond if you wish.

24 But go ahead.

25 MR. KRAUT: We could do this whichever way your Honor

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1 prefers. I thought it would be efficient to address, and
2 hopefully concisely as I could, the issues that relate to the
3 post-event-of-default claims that attach to both motions.

4 THE COURT: Keep your voice up.

5 MR. KRAUT: Your Honor, it was my intent to try to
6 efficiently address the issues relating to plaintiffs'
7 post-event-of-default claims that are attached to both our
8 motions and plaintiffs' motions. I thought that would be most
9 efficient.

10 THE COURT: OK. Just as an overview, I would have
11 thought that the arguments with respect to the
12 post-event-of-default duties that are raised in the plaintiffs'
13 motion for partial summary judgment and that are responded to
14 in your motion also raise issues of fact, as you were just
15 saying for your third point, so that it would not be possible
16 for me to issue summary judgment finding that the evidence was
17 so clear that the defendants breached post-event-of-default
18 duties. So following that, one would think that it would not
19 be possible to grant summary judgment to the plaintiffs or to
20 the defendants on post-event-of-default duties of the trustees.

21 MR. KRAUT: Your Honor, I would say --

22 THE COURT: Your third point, that you were just going
23 to make to me, was there are issues of fact that make it
24 impossible to decide the post-event-of-default issues. The
25 plaintiffs argue that the trustees did not act as a prudent

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1 person would have acted under all of the circumstances. The
2 defendants say no, that's not true; even though we didn't do
3 anything, it was actually prudent under the circumstances not
4 to do anything further than what we actually did, because there
5 were costs associated with doing anything further. We
6 consulted internally. We took some actions. We didn't take
7 other actions. But you can't decide on a motion for summary
8 judgment that what we did, the defendants say, was not what a
9 prudent person would have done under all of the circumstances.

10 So it's not so clear to me under all of the
11 circumstances why in support of the defendants' motion for
12 summary judgment you want to tell me that there are issues of
13 fact with respect to what the trustees did after events of
14 default and that they failed to act -- that there are issues of
15 fact as to whether they acted as they should have acted, as a
16 prudent person.

17 MR. KRAUT: Let me try to clarify, your Honor.

18 We agree -- and make no mistake about this; we will be
19 as clear as we can -- that the issue of prudence raises
20 questions of fact. We cite four or five cases on that point.
21 We don't think there's any serious dispute about that.

22 Towards the end of Mr. Biron's remarks, he identified
23 a few situations where we don't believe this, where trustee --
24 let me come back here.

25 To the extent that the plaintiffs are arguing that

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1 prudence required the trustee to pursue repurchase claims when
2 there are failed warrantors, where there are warrantors who
3 could not have paid and there's evidence that we put in the
4 record from our experts demonstrating which warrantors would
5 not have been able to pay and there's no rebutted evidence on
6 that, to the extent there are time-barred claims, to the extent
7 there are settled claims, to the extent that plaintiffs are
8 arguing that a prudent trustee would have done those things, we
9 don't believe there's any evidence in the record that could
10 possibly support that the trustee failed to act as a prudent
11 person by not pursuing those claims.

12 With the exception of those which we don't know, we
13 don't believe are seriously contested, we agree with your Honor
14 that prudence is an issue. But we agree with what I believe
15 your Honor was saying that issues of prudence or fact issues
16 are not resolvable on a motion for summary judgment and no
17 court, to our knowledge, has ever found a trustee imprudent as
18 a matter of law at this stage.

19 THE COURT: OK.

20 MR. KRAUT: So with that, I'll focus on the first two
21 points.

22 At this stage, plaintiffs need sufficient admissible
23 evidence for each trust that a contractually defined event of
24 default occurred, which for most trusts at issue here means a
25 servicer materially breached its contractual duties with

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1 respect to loans in a particular trust and the servicer
2 received notice of the material breach and failed to cure
3 during a defined cure period;

4 Two, the trustee had actual knowledge or written
5 notice of the event of default, whichever is required under the
6 governing agreement, and the trustee failed to act as a prudent
7 person would have acted under the circumstances before the
8 event of default was cured.

9 THE COURT: Which courts have been prepared to grant
10 summary judgment on those issues in favor of defendants?

11 MR. KRAUT: Judge Caproni held that, that there was no
12 evidence of written notice or actual knowledge of breaches. I
13 believe these issues were -- this is the same ruling in the
14 Tenth Circuit in *American Fidelity*.

15 THE COURT: I'm sorry?

16 MR. KRAUT: The Tenth Circuit in *American Fidelity*, I
17 believe, addressed these issues. Those are the two that come
18 to mind right now.

19 THE COURT: Which was Judge Caproni's decision?

20 MR. KRAUT: Judge Caproni was in *Phoenix Light v. Bank*
21 *of New York-Mellon*.

22 THE COURT: OK. That was summary judgment?

23 MR. KRAUT: Yes, your Honor.

24 THE COURT: OK.

25 MR. KRAUT: So, I'd like to start with plaintiffs'

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1 assertion that servicers' property maintenance resulted in
2 events of default, and I'll make three points which demonstrate
3 plaintiffs' failure of proof.

4 First, there's no admissible evidence of actual
5 trust-specific servicer breaches. Plaintiffs rely on
6 spreadsheets that municipalities sent to the trustees. Besides
7 being inadmissible hearsay, those spreadsheets don't say what
8 plaintiffs claim they do.

9 Deutsche Bank administered approximately 2,000 trusts.
10 The spreadsheets that are in the record show that across all of
11 those trusts, a city was claiming unpaid tickets or water
12 bills, and those spreadsheets, when plaintiffs actually put
13 them in the record -- and they didn't always -- typically don't
14 say which trusts were involved. Sometimes they don't even say
15 what the violation was. And servicers frequently told the
16 trustee that violations were unwarranted, inaccurate, or had
17 been paid.

18 THE COURT: Could you finish up in no more than five
19 minutes.

20 Go ahead.

21 MR. KRAUT: Just to be clear, your Honor, the entire
22 post-event of default in five minutes?

23 THE COURT: Yes. Between you and your colleague,
24 you've gone on for an hour and a half, which is longer than I
25 usually keep a reporter without a break, and there's a whole

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1 other argument, to say nothing of the response to your
2 arguments. If you were before the Court of Appeals, you would
3 get 12 minutes. An hour and a half is certainly generous.

4 MR. KRAUT: Understood, your Honor. I'll move as
5 quickly as I can.

6 THE COURT: No. Five minutes is as quickly as you
7 will.

8 MR. KRAUT: Understood, your Honor.

9 So, with the servicers' property maintenance, there's
10 no events -- admissible evidence of actual trust-specific
11 servicer breaches. At this stage the plaintiffs can't just say
12 there must have been violations in the trust and the trustee
13 had to know about them. That got them past their motion to
14 dismiss. That doesn't work at summary judgment, and as Judge
15 Caproni explained in the *Phoenix Light v. Bank of New York*
16 case, the plaintiffs can't rely on generalized proof or
17 evidence of pervasive breaches. And I'll list these off
18 instead of walking through the argument for time reasons.

19 But even if the spreadsheets reflected property
20 violations, that's not the same thing as showing servicer
21 breaches. Servicers have to service responsibly, but there are
22 many reasons why municipal tickets could arise without servicer
23 fault. The condition may have existed before the property
24 became REO. It may have happened afterwards. Sometimes the
25 servicer was --

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1 THE COURT: You're going to have to go slower for the
2 court reporter.

3 MR. KRAUT: Bottom line, your Honor, plaintiffs took
4 no discovery from cities or from servicers, and they have no
5 idea which property violations actually occurred and whether
6 they resulted from servicer wrongdoing. They have no idea
7 whether any of these breaches were material, whether the
8 violations, property violations were material servicer
9 breaches.

10 In one instance, the only trust-specific evidence for
11 REO 2006-M3 was one outstanding water bill. The trust had
12 3,500 loans and over \$700 million in principal. That's plainly
13 not material but, at a minimum, a disputed issue of fact.

14 Briefly, even if the plaintiffs could establish
15 material servicer breaches, there are additional hurdles that
16 the plaintiffs would have to overcome for a servicer breach to
17 write them into an event of default.

18 THE COURT: You just said that even if the plaintiffs
19 could prove that, there's a plain issue of fact, which was the
20 little introduction that I gave with respect to all of these
21 issues. But go ahead.

22 MR. KRAUT: Your Honor, all I meant to say is that
23 there are multiple things the plaintiffs have to show that they
24 haven't shown. They haven't shown that property violations
25 actually occurred with admissible evidence. They haven't

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1 showed that if there were property violations those resulted
2 from servicer default. They haven't showed that even if there
3 were breaches the violations were material, and now I was
4 saying that they haven't showed that they're cured. All of
5 these things, and then after cured, if not cured and that the
6 trustee received actual knowledge that they had not been cured.
7 All of these things are requirements for the plaintiffs to
8 establish an event of default, and there's an absence of proof,
9 and therefore their claim with respect to property violation
10 EODs fails.

11 I'll mention briefly another type of servicer event of
12 default relating to what plaintiffs refer to as robo-signing.

13 There's no admissible loan- or trust-specific evidence
14 of robo-signing of a single loan in any trust, much less the
15 trustee's actual knowledge of such conduct, whether you're
16 looking at the testimony -- and I know the plaintiffs pick out
17 a couple excerpts, but when you read the whole testimony, when
18 you read the media allegations, it's plain that they were, that
19 the notices that trustees sent out or anything the trustees
20 knew about, quote, robo-signing came from media allegations
21 that were not trust-specific. And again, as the courts have
22 emphasized, plaintiffs can't rely on notice of servicing
23 breaches to support a claim unless they can identify trust- and
24 loan-specific documents. Judge Pauley agreed on that point.

25 I'll make one more point about the disputed events of

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1 default, and I think I'll be out of time at that point.

2 Plaintiffs refer to servicers' annual statements of
3 compliance. As a threshold matter, this claim is not even
4 pled -- this theory's not pled in the complaints. Plaintiffs
5 amended multiple times, had opportunities to raise it; didn't
6 do it. For one trust involving Fremont, plaintiffs say Fremont
7 failed to deliver a compliance statement. Fremont wasn't even
8 a servicer of the trust when those statements were due. And
9 they also need to show that the late statement -- as little as
10 one week in some instances -- was a material breach. We
11 think -- well, I'll hold off on discussions of prudence.

12 Your Honor, those are my remarks with respect to the
13 disputed events of default.

14 THE COURT: OK. Thank you.

15 We'll take a five-minute break at this point.

16 (Recess)

17 THE COURT: All right. Please be seated.

18 All right. Plaintiffs.

19 MR. WOLLMUTH: Good afternoon, your Honor. May it
20 please the Court.

21 THE COURT: Good morning.

22 MR. WOLLMUTH: Still morning. Good morning, your
23 Honor.

24 Your Honor and madam reporter, I haven't done this
25 before with the mask, so if I'm either too fast or too quiet or

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1 too booming, please let me know, and I'll try to fix it.

2 Your Honor, order of proceedings, I will oppose most
3 of these arguments. Mr. Handlin will oppose pre-EOD duties and
4 post-EOD duties. The other arguments I will handle. And if I
5 may, I'm going to take standing and statute of limitations in
6 the main last, because I think I can hit a few points that your
7 Honor raised and the defendants brought out fairly quickly.

8 First, on the DTC issue, Judge Pauley does not apply
9 here at all in this context because he specifically applied
10 Ohio choice-of-law rules and looked for the place of
11 performance rather than the center of gravity required under
12 New York law. It was a unique Ohio law decision, and Judge
13 Pauley expressly states that fact in the reconsideration
14 decision.

15 Judge Pauley also states he does not dispute other
16 decisions not considering DTC or not finding it controlling and
17 is not applying DTC to overrule center-of-gravity analysis done
18 in other RMBS cases, such as Judge Failla's decision in *Pacific*
19 *Life*, which is cited in our opposition at page 7 and is
20 directly on point.

21 THE COURT: OK. But why wasn't the defendants'
22 original position that if you apply the center-of-gravity
23 approach under New York choice of law, you have to know who the
24 ultimate purchasers are in order to be able to make that
25 center-of-gravity analysis? And the plaintiffs concede that

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1 they don't know what the residence was of the purchasers of
2 these certificates to whom they were sold.

3 MR. WOLLMUTH: Yes, your Honor.

4 Defendants cite no case holding that every factor in a
5 center-of-gravity analysis must be identified and point in one
6 direction to reach a proper conclusion. Nobody knows who the
7 buyers are, but some law has to apply. And if I could just go
8 through it very quickly, what counts is the places of
9 contracting, negotiation, performance, the subject matter of
10 the contract and the domicile or place of business of the
11 parties. No single factor is determinative.

12 And your Honor also asked questions about the scope of
13 this motion, the standing motion. It's very limited. There
14 are only 33 sold certificates.

15 THE COURT: Oh, I know. This argument with respect to
16 sold certificates relates just to the sold certificates.

17 MR. WOLLMUTH: And it's only 33 of 128, 27 for Commerz
18 and six for Phoenix Light.

19 Taking first the Commerz sale, we have submitted the
20 uncontradicted sworn declaration of Robert Boelstler, and it
21 demonstrates, which is more than enough to carry our burden at
22 this stage, showing that the claims were not transferred, that
23 the transactions were negotiated in London between Commerzbank
24 London employees and eight specifically identified London
25 buyers. The certificates were held by Commerzbank in London.

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1 The sales were booked in London by Commerzbank's recordkeeping
2 employees. Commerzbank solicited bids for the certificates in
3 London via an auction in which it invited only London banks to
4 bid. All eight London banks were principal purchasers. We
5 have submitted the trade tickets in support of the
6 transactions. Grouping the relevant contexts together clearly
7 states that English law governs.

8 THE COURT: But the location of London branches has
9 been traditionally devalued, if you will.

10 MR. WOLLMUTH: And we had that conversation, your
11 Honor. That is when -- not under a grouping-of-context
12 analysis, that is under determining where the place of injury
13 is felt. This is different. OK? The facts occurred in
14 London, and I tried the branch argument regarding where the
15 impact of injury was felt, and your Honor correctly rejected
16 it. But none of those cases have anything to do with the
17 center-of-gravity analysis.

18 The only argument that Deutsche makes is
19 self-defeating. The cases they cite are at page 3 of their
20 reply, and they say the residence of brokers is a nonfactor,
21 and we have a similar case as well. So this was -- the buyers
22 were not brokers, so it's not even relevant, the string cite
23 they have at page 3 of their opposition. The buyers were
24 banks.

25 Next, as to the three -- six Phoenix Light

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1 certificates, the evidence is that the sales were controlled by
2 Cayman and Irish law, and what we have there is these are Irish
3 and Cayman entities that did the transactions, respectively.
4 That's where the sellers are. The buyers were brokers. On
5 both sides there was a collateral manager that brokered the
6 Phoenix Light certificates to receiving brokers, but all the
7 other factors that the Court can look to indicate either Irish
8 law or Cayman law, and that is explained in detail in our
9 papers.

10 But getting back to the, if DTC was even a factor to
11 be weighed in a grouping analysis, that is not even argued by
12 Deutsche Bank, and it cannot be a basis for granting their
13 motion.

14 Second, your Honor asked a couple questions about
15 champerty, and I just wanted to address those briefly.

16 THE COURT: I didn't think I did. I thought that the
17 champerty argument was noted by counsel on the other side as
18 not having been raised in these papers and up before the Second
19 Circuit, and I said counsel can make that argument in a
20 supplemental motion after the Second Circuit decides its case.

21 MR. WOLLMUTH: OK. Your Honor, champerty is before
22 the Court on three certificates, but they said that your Honor
23 need not consider the issue on reply. If your Honor didn't ask
24 the question, I apologize. Maybe it was counsel.

25 THE COURT: No. It's OK. You never need to

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1 apologize. I don't think I asked the question on champerty,
2 and it seems clear to me that the defendants are not raising an
3 issue of champerty on these motions.

4 MR. WOLLMUTH: And my point, your Honor, is that they
5 should not get another bite at the apple. They made the
6 argument as to three certificates. They withdrew the argument
7 in their reply. It's over. Now, if the Court wants to raise
8 it *sua sponte*, we understand.

9 THE COURT: No, no, no. I would not raise the issue
10 of champerty *sua sponte* on these motions. If there's a
11 subsequent decision by the Court of Appeals and a subsequent
12 motion, certainly if there's guidance from the Court of Appeals
13 on the issue, I would have it briefed on a supplemental motion.

14 MR. WOLLMUTH: Thank you, your Honor.

15 Moving back to a couple of the preliminary issues that
16 have been raised either by the Court or by the defendants'
17 arguments, the defendants always say, and I know your Honor
18 won't be swayed by this, but that the plaintiffs are getting
19 killed in all these cases. That is absolutely not true. Judge
20 Pauley took U.S. Bank behind the woodshed for its shocking
21 conduct in the face of vast breach notices, finding events of
22 default in every trust and marveling at the trustee's, his
23 word, "paralysis" in light of the breach notices that it had
24 received.

25 THE COURT: No, but defendants raise the fair point

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1 that they say there are seven cases in which courts have
2 dismissed similar claims on summary judgment, and there are no
3 cases, they say, which have granted summary judgment on behalf
4 of parties similar to yours in claims against trustees. So
5 fair question. Have there been any?

6 MR. WOLLMUTH: I'm unaware of any offensive summary
7 judgment motions being granted, but I'm unaware of any being
8 denied. I do take issue with -- and Mr. Handlin indicates
9 there may be one, but that's really his bailiwick.

10 The cases that are in the Southern District have not
11 poured these cases out by any means. We have hundreds of
12 millions, a couple hundred million of damages going to trial in
13 Judge Pauley's case, and we have meaningful damages going to
14 trial in Judge Caproni's case. So I think the defendants are
15 overstating their success a bit.

16 Some of the other cases are outside of this
17 jurisdiction -- *American Fidelity, Western and Southern v. Bank*
18 *of New York*, and I'm not at all familiar with *American*
19 *Fidelity* -- but I believe we address all of them in our briefs.

20 Next, the defendants argue that this case must be
21 proven loan by loan and trust by trust, and your Honor asked a
22 number of questions. Is that phase 1 or phase 2? And what I
23 took your Honor to be driving at is the difference between
24 liability and damages, and I wanted to speak briefly on this
25 point.

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1 Loan by loan and trust by trust is really a phase 2
2 issue. The Second Circuit ruling that is mentioned is
3 *Policemen's*, and that ruling is on a class certification
4 motion. The statement is dicta. The holding was that the
5 plaintiff there, which owned one RMBS trust, did not have
6 standing to represent many, many -- like 100-plus -- RMBS
7 trusts because it did not have adequate incentive to prove its
8 case loan by loan and trust by trust. That incentive's needed
9 at the liability phase not very much. It's needed a great deal
10 at the damages phase, which is why this case is bifurcated, and
11 it fits with the sole remedy. You have to go loan by loan and
12 trust by trust under the sole-remedy provision to calculate
13 damages.

14 THE COURT: My question with respect to the difference
15 between phase 1 and phase 2 was not really directed to is phase
16 1 limited to liability and phase 2 limited to damages? It was
17 all of these arguments that are being made to me about the need
18 to prove liability loan by loan, trust by trust, the question
19 is, is there any discovery that would be available in phase 2
20 discovery that would be relevant even to liability on a
21 decision of liability trust by trust loan by loan.

22 MR. WOLLMUTH: There may be. For example, one of the
23 trustees' arguments are the vast number of breach notices it
24 received are just allegations and they don't discover the
25 breach. If, for example, in their accounting for the trust

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1 they indicated a reserve for those kinds of breaches, it would
2 demonstrate actual knowledge, which is not required; there has
3 to be a discovery of the breach, which is a matter of hot
4 debate. But yes, I can certainly envision ways in which phase
5 2 discovery -- and that's off the cuff. I'm sure if I had a
6 little longer, I could come up with many more.

7 THE COURT: But how did the parties take their
8 depositions? Were there objections, No, you can't ask that,
9 that's phase 2 discovery?

10 MR. WOLLMUTH: I think that the parties on both sides,
11 and I don't think Morgan Lewis would disagree, we tried in good
12 faith to hew to phase 1 discovery on issues principally of
13 liability and phase 2 discovery will be broader. But
14 Mr. Handlin was directly involved in that discovery, and I'd
15 like to defer that question to him if I could, your Honor.

16 THE COURT: Sure.

17 MR. WOLLMUTH: OK.

18 Next, your Honor, you asked some questions on a single
19 certificate about an order from the Wisconsin court. Deutsche
20 Bank contends that Phoenix cannot sue on this certificate
21 because it lacks consent from the bond insurer, but *Ambac*
22 filing for rehabilitation is a defined insurer event of default
23 under the PSA. The argument that Deutsche makes is that this
24 Wisconsin order somehow negates that contractual provision.
25 That is clearly wrong.

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1 The bond insurer default is that *Ambac* went into
2 rehabilitation, and the order that they cite, and I direct your
3 Honor to the record -- it's Goff Reply Exhibit 3 -- does not
4 even purport to undo the default, nor could it. It merely
5 prohibits parties from exercising or disregarding the exercise
6 of rights by the *Ambac* rehabilitator. So that argument, I
7 think, should be put to bed.

8 THE COURT: In the brief, it did appear that the order
9 prevented the plaintiff from exercising their rights by
10 demanding action from the insurance company that was in
11 rehabilitation, and that appeared to be the effect of the
12 order. So my questions were really whether that was simply
13 stayed or completely prevented. If it were completely
14 prevented, it would appear that the defendants had a good
15 argument that they couldn't have been required to get that
16 consent.

17 MR. WOLLMUTH: Well, I don't think I heard them say
18 that it was permanent, so I won't take that on, but I do
19 question, and I think your Honor should, whether Deutsche Bank
20 has standing to raise that order. It's put in place so the
21 insurance rehabilitator has the scope of powers it needs to
22 undertake the rehabilitation of *Ambac*. If it thought its order
23 required an insurance consent in this case and the
24 rehabilitator chose to assert the order, it could. It does not
25 say the trustee can assert the order. So I think both: one,

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1 it's not permanent, and two, I think there's a lack of
2 standing.

3 THE COURT: Why do you say it's not permanent?

4 MR. WOLLMUTH: Well, it's a question of fact is what I
5 meant, your Honor. There was not an answer to your question
6 that I heard.

7 THE COURT: OK. Your colleagues are going to put in a
8 brief letter on that, no more than two pages. You're welcome
9 to do the same.

10 MR. WOLLMUTH: Thank you, your Honor.

11 Next, as to the settled trusts in the Fremont matter,
12 I wanted to make a couple of points very briefly.

13 The facts underlying Deutsche Bank's Fremont argument
14 are material, disputed and complex, and their brief treats them
15 very summarily. They leave out key details.

16 The warrantor never went bankrupt. It was named FIL,
17 and it had hundreds of millions of dollars. They claim the
18 March 2010 settlement settled the repurchase claims for three
19 trusts, but it did not. The trustee had previously sought
20 authority to settle those trusts, but it could not get
21 authority from certificate holders. And because it could not,
22 it made a side deal with FIL.

23 The deal was that it would not pursue repurchase
24 claims unless directed by investors. Deutsche Bank had no
25 right to make that deal under the terms of the PSAs. They had

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1 already discovered the breach, and by 2010, several events of
2 default had already occurred in each of those three trusts.
3 They were a prudent person bound to exercise their rights and
4 powers, and they could not abandon those by agreeing not to
5 exercise them. This is a question of fact.

6 THE COURT: It's a common argument against the motion
7 for summary judgment that there are issues of fact, but there
8 do appear to be settlement agreements that would waive these
9 claims.

10 MR. WOLLMUTH: Absolutely not, your Honor. I ask you
11 to examine the discussion of the point in our papers. The
12 claims are not expunged. The trustee agrees not to exercise
13 its rights. They're different.

14 The next five trusts on Fremont, which I will address,
15 the claims were expunged, and if I may, I have a brief answer
16 to those.

17 THE COURT: Go ahead.

18 MR. WOLLMUTH: For the other five trusts, Deutsche
19 Bank asserts that it's entitled to summary judgment because of
20 settlements executed in 2008 and 2009. However, Deutsche Bank
21 cannot use those settlement agreements for summary judgment
22 here. They obtained the settlements by misrepresenting the
23 facts to investors to obtain their consent.

24 On pages 26 and 27 of our opposition, we cite several
25 cases on point. One directly on point is the *Birnbaum* case on

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1 page 7 -- 27, which specifically states that which is at issue
2 here. It says consents procured by a fiduciary are voidable if
3 the fiduciary fails to disclose material facts.

4 THE COURT: But of course, that case does not deal
5 with these settlements, and all of the arguments with respect
6 to the invalidity of the settlement are certainly not raised in
7 the pleadings. They're raised in your brief, but they're
8 unsupported, that all of this was essentially fraudulent.

9 MR. WOLLMUTH: Well, they're not pled for a good
10 reason, and Deutsche makes that point. The fraudulent
11 obtaining of investor consents is not a claim that we needed to
12 plead. Plaintiffs had no reason to raise this position until
13 Deutsche Bank asserted the consents it fraudulently procured
14 entitled it to enter into settlements.

15 THE COURT: But doesn't that claim belong in another
16 case? Here, we have a settlement agreement approved by the
17 court, and now you say OK, there are those settlement
18 agreements, but they were fraudulently obtained. OK. Go back
19 to the court that approved the settlements and get the
20 settlements overturned.

21 MR. WOLLMUTH: We're not trying to undo the
22 settlements, your Honor. That ship has long sailed. The money
23 is gone. The point is that the trustee should not be allowed
24 to raise the settlement as a defense. It was a breach of its
25 fiduciary duties to fraudulently obtain consents and execute

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1 the settlements at a low value. That is a clear breach of its
2 prudent-person duties. It's a breach of its express direction
3 under the trust to exercise all rights and powers following
4 events of default for the benefit of certificate holders. And
5 the misrepresentations are supported, as the exhibits to our
6 papers show.

7 What was not disclosed in the consents -- see,
8 Deutsche Bank told investors, You'd better settle because FIL
9 has no money. What was not disclosed was that the apparent
10 bankruptcy of an entity known as SGC did not implicate FIL.
11 FIL, in fact, had hundreds of millions of dollars of cash
12 because the FDIC had required it to sell its business, and that
13 cash was just sitting there, able to satisfy repurchase claims.
14 In fact, it was greater than all the repurchase claims in our
15 case.

16 Deutsche Bank was acting as a fiduciary, and it needed
17 to disclose these facts and it could not omit facts either
18 given its fiduciary duty to disclose. And Deutsche Bank has no
19 answer for these points, which are well supported in the
20 record. It only says the notices we sent out speak for
21 themselves. That's not persuasive, so I would submit, your
22 Honor, that a reasonable jury could find that it was a breach
23 of the trustee's prudent-person duties and a breach of its
24 obligation to exercise its powers to take a
25 pennies-on-the-dollar settlement for loans that were -- phase 2

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1 will show -- I know Fremont loans; they're atrocious. It was a
2 breach of the trustee's duty to settle for pennies on the
3 dollar when there was plenty of cash available to satisfy the
4 repurchase claims.

5 Unless your Honor has questions, I'll move on from
6 Fremont.

7 THE COURT: Move on to?

8 MR. WOLLMUTH: Move on from Fremont.

9 THE COURT: Yes.

10 MR. WOLLMUTH: Next, I just wanted to clarify. Your
11 Honor had made a comment on the argument that repurchase claims
12 relating to document-delivery failures are time-barred.

13 THE COURT: That's what I decided on the motion to
14 dismiss, and I took it from your papers on this motion that you
15 were not contesting that.

16 MR. WOLLMUTH: Well, we're not contesting what your
17 Honor actually did rule, so if I could walk through it briefly,
18 your Honor?

19 And by the way, their argument regarding the
20 time-barred nature of repurchase claims for these loans is
21 raised only in a footnote in their opening brief: Commerzbank
22 footnote 21 and Phoenix Light footnote 10.

23 One, I think that makes the arguments facially
24 insufficient.

25 THE COURT: No, because I had already decided that on

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1 the motion to dismiss, and I really thought that in your
2 briefing on this motion you didn't contest that.

3 MR. WOLLMUTH: So, your Honor, here's what your Honor
4 said. The Court dismissed document-delivery claims accruing
5 when the trust closed. Specifically what was argued at the
6 motion-to-dismiss stage was inventorying of documents on
7 initial delivery and the production of exception reports.

8 We do not make those claims because your Honor did
9 dismiss them. The Court stated to the extent that claims for
10 breach of contract are based on facts that took place after the
11 loans were in the trust, they are not time-barred. Breach of
12 repurchase obligations occurred years after the loans were in
13 the trust, and under your Honor's ruling, they are not
14 time-barred at all.

15 Your Honor continued, Deutsche Bank's motion to
16 dismiss on statute of limitations is granted only to the extent
17 that claims based on the failure -- that claims are based on
18 failure of Deutsche Bank to object initially to
19 document-delivery failures, not repurchase claims. Just as it
20 did at the motion-to-dismiss stage, Deutsche tries to bootstrap
21 those rulings and rehash an argument that the Court expressly
22 rejected at the motion-to-dismiss stage.

23 They argue that the statute of limitations begins to
24 run on the repurchase of document claims when exception reports
25 are delivered. They made that exact same argument at the

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1 motion to dismiss, and the Court rejected the argument, and
2 quoting the Court, that "the claims hinge on allegations that
3 Deutsche Bank breached its duties to enforce remedies when the
4 final exception reports were delivered." That was their
5 argument then and now, and your Honor rejected it at page 709
6 in the original motion to dismiss. And the Court sustained as
7 timely claims that Deutsche Bank stood idly by, and this is
8 quoting the Court, "while servicers and master servicers
9 engaged in so-called robo-signing on a widespread basis when
10 missing documents were needed to foreclose."

11 The claims that the Court found timely at the
12 motion-to-dismiss stage related to document deliveries are the
13 exact claims before the Court. Plaintiffs claim now missing
14 documents needed to foreclose triggered repurchase obligations
15 in every trust, and the trustee "stood idly by" and did
16 nothing, in the Court's words, while servicers robo-signed.

17 Second, when documents remained missing for years
18 after the final exception reports and the initial document
19 delivery was made, the prudent-person duty kicked in. So when
20 documents remained missing after the cure period afforded by
21 the PSAs, it triggered repurchase obligations for breaches of
22 reps and warranties in 46 trusts and a separate obligation to
23 repurchase the document-deficient loans in all trusts.

24 And third, in every trust, servicers violated their
25 prudent servicing duties.

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1 THE COURT: OK. I don't think that the defendants are
2 making the argument that what I said on the motion to dismiss
3 with respect to document-delivery claims is broad enough to
4 cover all of the arguments with respect to repurchase claims.
5 And defendants can correct me if I'm wrong.

6 MR. WOLLMUTH: Well, we have no issue with that, your
7 Honor. What your Honor ruled was clear. The initial failure
8 to inventory documents at closing is time-barred. The failure
9 to produce exception reports is time-barred.

10 THE COURT: And I also thought that in your papers on
11 the motion, you really didn't dispute that either.

12 MR. WOLLMUTH: We don't dispute those two rulings,
13 your Honor. We do dispute that any repurchase claims are
14 time-barred, and your Honor hit that right on the head. And in
15 fact --

16 John, could you please give to the law clerk and Judge
17 Koeltl our slides, and the other side.

18 THE COURT: Perhaps you could move on to the statute
19 of limitations.

20 MR. WOLLMUTH: Yes. And this is part of the statute
21 of limitations, so if I could just briefly, your Honor, direct
22 the Court to page 15 of the slide deck.

23 Deutsche does not present any facts that would justify
24 your Honor deviating from its ruling on repurchase claims at
25 the motion-to-dismiss stage, including for document-delivery

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1 failures, and I'd just like to show your Honor what I'll refer
2 to today as a 2 percent letter.

3 THE COURT: Weren't we on to the statute of
4 limitations?

5 MR. WOLLMUTH: This is the statute of limitations
6 point, your Honor.

7 THE COURT: OK.

8 MR. WOLLMUTH: After the cure period ran out, each
9 year, up to and including 2011, which makes all claims under
10 any statute of limitations timely, each year the trustees sent
11 these 2 percent letters to the servicers. It should have
12 noticed a servicing breach for failure to cause repurchase of
13 the loans, but instead, as you'll see, they just say, "Enclosed
14 please find the current mortgage loan document exceptions" --
15 this is the trustee writing in 2011 -- "exceptions report for
16 Ameriquest"; "We request that you and each party copied on this
17 correspondence review the exceptions report and notify us if
18 you think the reported exceptions are material. Your response
19 to this inquiry will be used to determine whether or not
20 remedial action is required to be taken."

21 So, just a couple of statute-of-limitations points
22 there, your Honor. Under the *BLB* case from the Second Circuit
23 that we cite to the Court, how long the trustee had to take
24 remedial action is a question of fact that can't be decided on
25 summary judgment.

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1 In 2011, it is still stating to the servicers, Hey,
2 let us know if there is a meaningful problem here; we need to
3 evaluate it to take remedial action.

4 That means that all of the repurchase claims as to the
5 document-deficiency notices must fail even under the German
6 statute of limitations.

7 Moving on to the bulk of the statute-of-limitation
8 arguments, they're scattershot in a way, your Honor. They
9 attack a variety of claims, plaintiffs' trust and limitations
10 period, so I'd like to clarify.

11 THE COURT: Whoa, whoa, whoa, whoa. Let's be clear.

12 First of all, with respect to Commerzbank, you don't
13 dispute that I should be applying the German statute of
14 limitations, right?

15 MR. WOLLMUTH: I do, your Honor.

16 THE COURT: You do?

17 MR. WOLLMUTH: As to many, the Barrington II trusts
18 are not -- so the 22 certificates Deutsche Bank -- may I
19 outline for the Court exactly what the German statute of
20 limitations should apply to, because Deutsche has not?

21 THE COURT: Well, you can outline what you contend the
22 German statute of limitations should apply to both with respect
23 to Commerzbank and Phoenix Light, sure.

24 MR. WOLLMUTH: Thank you, your Honor.

25 First, none of the limitations periods address the

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1 continuing prudent-person period that arises after an event of
2 default, German or otherwise. So entitlement as to that is off
3 the table. But 22 of the Barrington II certificates, the
4 claims accrued first in the Cayman Islands.

5 THE COURT: I'm sorry. We're talking now about
6 Commerzbank or Phoenix Light?

7 MR. WOLLMUTH: Commerzbank.

8 THE COURT: OK.

9 MR. WOLLMUTH: Deutsche Bank has no German
10 statute-of-limitations defense for the 22 Barrington II
11 certificates. The certificates were not transferred to
12 Commerzbank from Barrington until 2012. Therefore, the
13 earliest possible date that the German statute of limitations
14 could have run is 2016, and this case was filed in 2015, so it
15 cannot apply to Barrington II.

16 The Cayman statute, which is six years, is not even
17 addressed by Deutsche.

18 Third, there's no valid argument that the German
19 statute of limitations applies to any Phoenix Light plaintiff,
20 and your Honor did ask a number of questions about this, unless
21 I missed the point. There's ten different Phoenix entities
22 that brought suit. For nine of the ten entities, Deutsche does
23 not even contend that the German statute of limitations
24 applies. Those are entities like Blue Heron and others. The
25 plaintiffs for those nine entities assert timely claims on 58

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1 certificates. Deutsche Bank does raise the German statute of
2 limitations for 29 certificates owned by the entity Phoenix
3 Light. It is one of ten.

4 But Deutsche does not dispute that Phoenix is an Irish
5 company, incorporated in Ireland, with a board of directors in
6 Ireland. Under the New York borrowing statute, that means that
7 either New York or Irish law applies.

8 THE COURT: The ultimate trust beneficiaries are all
9 German.

10 MR. WOLLMUTH: There is no trust. They make that
11 appearance in their papers, but no trust is involved in the
12 Phoenix transaction, and I'll walk through it.

13 Phoenix argues -- I mean Deutsche Bank argues that
14 because Phoenix pledged assets as collateral to a trustee for
15 the benefit of German noteholders -- they're not the
16 beneficiaries of the trust -- and there is no trust. There's
17 just a collateral trustee.

18 THE COURT: OK.

19 MR. WOLLMUTH: Pledged assets as collateral for German
20 noteholders, Phoenix should somehow be transformed from being
21 an Irish resident into a German resident. It's absurd. It's
22 like saying that if the Mets pledge Citifield --

23 THE COURT: Well, hold on.

24 MR. WOLLMUTH: -- as collateral to German noteholders
25 that financed the stadium the Mets are a German entity, and

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1 this exact matter -- and your Honor was about to say something,
2 but I would like to just point this out. The exact argument
3 under nearly identical facts was made in the *House of Europe*
4 case cited in our briefs to Judge Sullivan, and he summarily
5 rejected the argument when he was a member of this court.

6 In *House of Europe*, like here, plaintiff pledged
7 assets to an indentured trustee to secure certain notes, and
8 the court rejected the argument. And there's another case to
9 the same point cited in our briefs. They have no contrary
10 authority. So the German statute of limitations does not apply
11 to any of the Phoenix Light plaintiffs. It does not even
12 purport to apply on two-thirds of the certificates, and the one
13 argument as to the remaining 29 certificates fails. The German
14 statute of limitations is irrelevant to the 22 Barrington II
15 certificates.

16 And next, under clear law, the German statute of
17 limitations is also irrelevant to breaches occurring after
18 2011. Because our complaint for Commerzbank was filed in 2015,
19 December 31, 2011, is the magic date.

20 THE COURT: Could I stop you for a moment.

21 MR. WOLLMUTH: Yes.

22 THE COURT: With respect to Commerzbank, there are 22
23 Barrington certificates out of how many that Commerzbank is
24 suing for?

25 MR. WOLLMUTH: It's a good question, your Honor. I

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1 think it's a majority, but I don't have the -- I may have the
2 exact number.

3 John -- may Mr. Hein give me that number, your Honor,
4 while I move on?

5 THE COURT: Sure.

6 MR. WOLLMUTH: Because I don't know off the top.

7 THE COURT: OK. Do you have any idea how many trusts
8 you're dealing with for the 22 Barrington certificates?

9 MR. WOLLMUTH: It's probably close to 22, your Honor.

10 THE COURT: OK.

11 MR. WOLLMUTH: I would guess 20.

12 THE COURT: OK.

13 MR. WOLLMUTH: It's probably 20 trusts. Often they
14 double up in a couple.

15 John, do you have the number? Or Jay, if you do?
16 Otherwise we'll submit it to the Court after, if you could make
17 a note, John.

18 THE COURT: OK.

19 MR. WOLLMUTH: I may run into it. I think it's in my
20 outline.

21 Next, because our complaint for Commerzbank was filed
22 in 2015, the magic date is December 31, 2011, and for the
23 original Phoenix trusts, it's December 31, 2010. Deutsche Bank
24 does not dispute that plaintiffs seek damages for breaches that
25 occurred after 2010 and '11 in every trust. And post-2011

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1 breaches abound, including continuing breaches of Deutsche's
2 prudent-person duties, Deutsche's failure to address ongoing
3 servicing breaches and letting repurchase claims expire without
4 any action in 2012 for 2006 trusts and 2013 for 2007 trusts,
5 whether breaches occurred after 2011 is a question of fact that
6 precludes summary judgment on the German statute of
7 limitations.

8 On the merits of the German statute of limitations,
9 both Judge Pauley, who I was friendly with, and I just think he
10 got it wrong in that decision --

11 THE COURT: There's no other decision, other than
12 Judge Pauley's, on German statute of limitations, is there?

13 MR. WOLLMUTH: Actually, there's several that lay out
14 the governing principles, and Judge Pauley did not apply any of
15 them. Judge Failla described it as one of the silver linings
16 to the financial crisis, that there's now there's a good body
17 of law in the Southern District.

18 THE COURT: Hold on. Judge Pauley applied the German
19 statute of limitations and found that claims were barred. Is
20 there any other judge who applied the German statute of
21 limitations and found that claims were not barred?

22 MR. WOLLMUTH: At the motion-to-dismiss stage, your
23 Honor did in this case. Judge Failla did.

24 THE COURT: No, no, no. On summary judgment.

25 MR. WOLLMUTH: No. I think that's the only case

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1 that's considered it, your Honor.

2 THE COURT: OK.

3 MR. WOLLMUTH: I don't believe there's another case,
4 but it's a good point, and if I could refer your Honor to page
5 13 of the slide deck that I handed up to the Court, Judge
6 Pauley -- these are the principles that govern German law in
7 the Southern District, and they're set forth in a trilogy of
8 cases: your Honor's decision, Judge Failla's decision, and a
9 decision we submitted on supplemental authority which you were
10 blessed with called *Deutsche Zentral* from Judge Torres.

11 As your Honor stated, quoting the Second Circuit,
12 knowledge triggering the German statute means knowledge of the
13 facts necessary to commence an action with some prospect of
14 success; must have actual knowledge of the facts -- and this is
15 the one that really calls for the complete rejection of
16 defendants' German statute-of-limitations motion -- that would
17 allow him to conclude as a matter of fact, not suspicion or
18 speculation, which is not allowed under German law, that the
19 defendant trustee was culpable in the way that caused
20 plaintiffs' losses.

21 Most of what *Deutsche* cites does not go to that at
22 all. It says there was a lot of press about originators and
23 sellers having breached their duties, but it doesn't say
24 anything about the trustee's duties. The burden of proof is on
25 the defendant, which has not been sustained here, and gross

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1 negligence means only that the plaintiff cannot shut its eyes
2 to what is readily available to the plaintiff without
3 considerable effort.

4 And Deutsche ignores the facts that were prevailing in
5 2011. Most striking on this motion is the complete absence of
6 any evidence unearthed by Deutsche, not one shred, indicating
7 that plaintiffs had any inkling that Deutsche was significantly
8 responsible for their losses. That is not surprising because
9 the long-term picture in 2011 makes clear that all of
10 Deutsche's German statute-of-limitations claims are completely
11 implausible.

12 In 2011, only four suits ever had been brought against
13 RMBS trustees. Three of those cases were against Bank of New
14 York-Mellon. It is public record that in 2011 Bank of New
15 York-Mellon settled all of the Countrywide trusts for \$8-1/2
16 billion as trustee, and that was very controversial. Some
17 investors liked the settlement, like PIMCO and Blackrock.
18 Other dissatisfied investors filed cases against Bank of New
19 York.

20 THE COURT: I don't understand that argument. Here
21 are all of these other lawsuits, which were outstanding against
22 other participants in the chain, claiming various fault along
23 the way, and so no one was really suing the trustees at that
24 point, but all of the facts were out there, enough to bring all
25 of the claims against the other intermediaries, but no one was

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1 yet suing the trustees. That doesn't make all of the facts of
2 all of the bad loans and the robo-signing and all of the other
3 allegations go away. It just means that no one yet thought,
4 Well, we have another potential defendant out there -- namely,
5 the trustee -- who was holding these assets, so now we should
6 sue the trustee.

7 That doesn't mean that the plaintiffs were unaware or
8 were grossly negligent in not being aware of the potential
9 lawsuit against the trustees. And in fact, doesn't Commerzbank
10 argue that in its papers; that, in fact, by the end of 2011, it
11 knew that it was being wronged by the trustee?

12 MR. WOLLMUTH: No, it doesn't, and your Honor ruled
13 that at the motion-to-dismiss stage specifically. They made
14 the same argument that the allegation in the complaint somehow
15 put us on notice, and what your Honor said is it's not
16 connected to any of the trusts in this case, and your Honor
17 continued with the critical point.

18 See, we don't really dispute that there was widespread
19 knowledge of rep and warranty breaches by originators. They
20 were getting pilloried. We don't dispute that there was some
21 evidence very early of robo-signing. What your Honor wrote at
22 the motion-to-dismiss stage is that there was nothing that
23 Deutsche presented that said we had facts, which is what's
24 required in Germany, not in notice pleading, facts, your
25 Honor's phrase was connect the dots. There was no evidence

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1 that we have facts sufficient to connect the dots where there
2 was knowledge of these things going on, where there was other
3 lawsuits against other trustees that are not Deutsche Bank,
4 which your Honor also specifically rejected as a factor, to
5 conclude that Deutsche Bank had been breaching its duties on
6 any one of these trusts.

7 We had no facts, and the reason I mentioned the \$8-1/2
8 billion settlement is that the evidence before your Honor shows
9 that Commerzbank was far from negligent. It is undisputed that
10 in January 2012, which is after the date --

11 THE COURT: Whoa, whoa. I'm sorry. Commerzbank was
12 far from negligent?

13 MR. WOLLMUTH: Far from negligent. It was trying to
14 get to the bottom of what was happening, and it was work --
15 after the \$8-1/2 billion settlement was announced in 2011,
16 Commerzbank began -- joined the PIMCO-Blackrock group that
17 secured that settlement, contacted the Deutsche Bank trustee
18 and said: Please investigate whether there are any breaches in
19 our trusts. Please let us know if any repurchase claims should
20 be brought. And if you don't intend to do either of those
21 things, please let us know.

22 As a matter of law, it is clear and uncontradicted,
23 and this is all on a slide that gives you the cite, your Honor,
24 and it is slide 11, if the Court could refer to it. And I
25 invite your Honor after the argument to take, and we may have a

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1 copy here if you'd like to see it, a look at Lucht Exhibit 93,
2 which is cited at the bottom.

3 So Commerzbank is part of this group. It joins in
4 late 2011. This is at the very end of the relevant period,
5 anyhow, when there could be a trigger. U.S. Bank was the first
6 trustee other than Deutsche sued in this Court on November 9,
7 2011. Your Honor didn't even rule on that case on the motion
8 to dismiss until 2013. Commerz chose a different route.

9 The plaintiffs that sued trustees were outliers. What
10 the most sophisticated bondholders in the world, PIMCO and
11 Blackrock, were trying to do at this stage was work
12 collaboratively with the trustees to see if they could secure
13 more large settlements, like the Countrywide settlement. And
14 that's exactly what Commerzbank did. As Lucht 93 indicates, we
15 contacted Deutsche first in October of 2011.

16 THE COURT: If sophisticated investors make a decision
17 to try to work out a settlement prior to beginning a litigation
18 and without a tolling agreement, that's on them --

19 MR. WOLLMUTH: That's their problem.

20 THE COURT: -- if the statute of limitations passes.

21 MR. WOLLMUTH: I know, but that's not what we're
22 arguing, your Honor.

23 Just to be clear, if we could look at 11, what this
24 shows, it's objective evidence, uncontradicted in the record,
25 Commerzbank, for the statute to have started, would have had to

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1 have actual knowledge or have been grossly negligent in not
2 obtaining facts as to each trust.

3 THE COURT: But that's exactly what Judge Pauley
4 found.

5 MR. WOLLMUTH: Well, Judge Pauley made a couple of
6 errors, and as I said, I regret saying this given recent
7 events, but he did not consider ongoing prudent-person
8 breaches, which would have negated his ruling. He did not
9 consider other post-2011 breaches, and he didn't look deeply
10 enough at the evidence to see that what Commerzbank was doing
11 in 2012 was asking --

12 THE COURT: A continuation of the breach, such as a
13 continuation of the failure to act as a prudent person,
14 wouldn't prevent the statute of limitations from running.

15 MR. WOLLMUTH: No case so holds, your Honor, and in
16 fact, numerous cases note the continuing nature of the
17 trustee's duty. A statute of limitations for the duty is
18 provided directly in the PSAs. It says the duty shall continue
19 and the trustee shall exercise its powers until such time as
20 the event of default is cured.

21 It's a question of fact as to when Deutsche breached
22 that duty, because they have no evidence as to any trust as to
23 when it was breached, but even if they did breach it once, the
24 duty does not go away. This is the classic continuing duty,
25 which is recognized under law. It's expressly provided for by

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1 contract, and no case says that the prudent-person duty of the
2 trustee terminates, nor does it address the extra-contractual
3 duties that your Honor found as a matter of tort that continue
4 until the event of default is cured. The tort concept does not
5 have the ace for Deutsche Bank concept, but I think it would be
6 error to conclude that there was a one-and-done breach of this
7 duty anyhow, your Honor. There's no evidence of it, and it's
8 not what Deutsche contracted for.

9 Deutsche would have this Court believe that an event
10 of default could occur and it could say, privately, without
11 telling another person on the planet, Well, I'm not going to do
12 anything and that forever cuts off its duty to act, at least
13 triggers the statute of limitations. That's absurd. They are
14 the gatekeeper.

15 THE COURT: Try not to use "absurd." I haven't
16 counted, but the number of times that that word appears in the
17 briefs is excessive.

18 MR. WOLLMUTH: I apologize for that, your Honor, and I
19 certainly won't do it again. I have pet peeves with words too.
20 But it's unfair and inequitable to apply that interpretation.

21 THE COURT: Better.

22 MR. WOLLMUTH: Thank you, your Honor.

23 Because the trustees take assignment of every single
24 right that the holders have. As your Honor noted at the
25 motion-to-dismiss stage, it's very difficult for investors to

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1 find out what's going on because they don't have any access to
2 loan files and they have no right to request information from
3 the trustee beyond what's in the remittance reports. And
4 Commerzbank did so, and the evidence is uncontradicted that
5 Deutsche Bank didn't give them the information.

6 THE COURT: I'm sorry. Isn't there also a decision
7 from the New York State Supreme Court which dismissed the
8 Commerzbank case on the grounds that it knew of the breaches
9 before 2011?

10 MR. WOLLMUTH: No, your Honor. Actually, the case
11 you're referring to, and I'm glad you bring it up, because
12 Deutsche tries to conflate it into something it's not. We had
13 sued. We, Commerzbank, had sued the securities underwriters,
14 the sellers of the securities, for misselling those securities
15 and misrepresenting loan quality, because that was the first
16 wave of this litigation, and Court may remember there was an
17 avalanche of those cases. And those could be brought because
18 with statistical analysis through vendors, you could identify,
19 by 2011, 2010, that it was very likely that some of the loans
20 within the trust did not satisfy reps and warranties. Some of
21 those pleadings got past a motion to dismiss. Some didn't.
22 CoreLogic was the vendor, and Commerzbank tried to bring one of
23 those cases against the sellers of the securities, saying that
24 they were defrauded, and that was held to be too late.

25 Deutsche tries to suggest that it was a trustee case

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1 or that they brought it because they knew the trustees were not
2 doing their job. That's not true at all. The case was brought
3 against the people that sold them the instruments because they
4 thought they were defrauded, and that has absolutely nothing to
5 do with this case.

6 THE COURT: OK. All right.

7 MR. WOLLMUTH: If I could continue for a moment on the
8 statute of limitations, your Honor?

9 Under the facts -- under the standard, I'm sorry, in
10 the Southern District whether they were on motion to dismiss or
11 not, the four things that I showed you on the prior slide have
12 to be present for the statute to be triggered; that is, actual
13 knowledge; the defendant was culpable for your losses; or gross
14 negligence.

15 THE COURT: I think you've gone on for close to
16 another hour and a half. Your colleague is shaking his head.

17 I really don't need advice from other lawyers. All
18 right?

19 MR. WOLLMUTH: Your Honor, maybe the most productive
20 thing I could do with the remainder of my time, if the Court
21 will allow it, I'd like to run through very quickly the few
22 pieces of evidence that Deutsche does point to on this motion.
23 There's very little, and none of it establishes their
24 entitlement to judgment as a matter of law.

25 First, for the reasons I already discussed,

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1 Commerzbank was not grossly negligent;

2 Second, Deutsche Bank states that by 2011, and this is
3 what your Honor was just asking about, Commerzbank was
4 communicating with law firms because it knew --

5 THE COURT: Before you do that, could I just ask a
6 couple of other specific questions.

7 MR. WOLLMUTH: Sure thing, your Honor.

8 THE COURT: One is what are the strongest cases that
9 you rely on that the economic loss doctrine now does not bar
10 your tort claims? Since I decided the motion to dismiss, there
11 have been some other cases in the Southern District which
12 appear to suggest that the economic loss doctrine would bar the
13 tort claims. So what are the strongest cases on which you
14 rely?

15 MR. WOLLMUTH: Sure. The case you're referring to,
16 actually, your Honor, is *Triaxx*, and that doesn't do anything
17 but judge the pleading before the court and says that no
18 extra-contractual tort duty is pled.

19 The other case they rely on is a state case named
20 *Blackrock*, where it's the same; it's confined to its pleading.
21 And Judge Pauley most recently decided that those cases are
22 meaningless and that the economic loss -- held they're
23 meaningless; they do not control the result in these cases.
24 I'll try to speak more carefully. And he struck down the
25 economic loss doctrine defense at summary judgment.

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1 The other case that's important that we cite is
2 *Assured Guaranty*, because that is actually the binding
3 authority. It is an Appellate Division case from 2010 that was
4 affirmed by the Court of Appeals. So the two strongest cases
5 we have are Judge Pauley's decision and *Assured Guaranty*, and
6 the two cases they have represent neither a change in law nor
7 are controlling authority on this Court, which is what this
8 Court would require to move from the law of the case that your
9 Honor has already announced.

10 THE COURT: OK.

11 MR. WOLLMUTH: All right. As to the points that they
12 actually do point to, there's that 2011 securities suit, first,
13 and they say that it is brought because it was known defendant
14 and other trustees were not pursuing such actions. That's
15 absurd. The trustee -- that is stricken. That is wrong. The
16 trustee couldn't have pursued a securities case. This was a
17 case about the selling of securities that had nothing to do
18 with trustees.

19 Second, in the fall of 2011, Commerzbank joined, and
20 all these, the German statute of limitations doesn't apply to
21 Phoenix Light, which is why I keep mentioning Commerzbank.
22 Commerzbank joined the Gibbs & Bruns group that was working
23 with PIMCO and Blackrock and tried to work collaboratively with
24 trustees to find out if there were breaches in reps and
25 warranties in the trusts or if there were valid repurchase

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1 claims in these trusts, which was not known despite the
2 widespread market problems. Defendants point to joining that
3 group and being diligent as evidence of knowledge, but it's
4 shown by the letter I was referring to earlier that in 2012 we
5 still did not have knowledge of breaches or repurchase claims.

6 Third, remittance reports are pointed to, and these
7 are, if you've ever seen one, they're very summary statistical
8 reports given by the trustees, showed that loans were not being
9 repurchased, but that's not proof of anything. The plaintiffs
10 had no access to loan files and the plaintiffs had no basis to
11 know if the defective loans were causing loss in their trusts.
12 They had no basis to know whether repurchase claims are being
13 worked on, negotiated, investigated. That's why they were
14 asking Deutsche Bank. The remittance reports don't say any of
15 that.

16 Fourth, there were no EODs declared. That's a false
17 statement. You'll see from the papers, prior to 2011, Deutsche
18 Bank had communicated with investors regularly in had a way
19 that suggested they were doing their job. On 28 trusts they
20 did declare EODs, which suggested they were the cop on the beat
21 looking out for investors. They sent notices -- we saw the
22 one -- to the servicers about robo-signing in 2007, '8 and '9.
23 Those are ministerial acts. I say that because the trustee
24 itself says it doesn't do anything not required by its contract
25 until there's an event of default. It denies an event of

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1 default, and those acts weren't required by its contract.

2 It also entered into the Fremont settlement that we
3 discussed earlier. So the information in the marketplace
4 negated the significance that events of default hadn't been
5 declared on these trusts -- well, there were on some, actually.
6 It's not even true. But 28 events of default occurred and the
7 absence of default only would have suggested the trustees were
8 doing their job and causing the servicers to cure any breaches.

9 Next, they state that the event-of-default notices
10 they did send in those 28 trusts, which kind of contradicts
11 their prior point, state that Deutsche Bank would not take any
12 action unless specifically directed by investors. That's a
13 false statement. And we have a slide -- it's No. 14 -- with
14 what was actually said to investors. It says, and it's in the
15 call-out, line 1 into line 2, "a majority of the voting rights
16 has the right to direct the trustee to terminate the
17 servicing."

18 That's it. It never says the trustee won't take any
19 action unless directed by investors. It doesn't say that the
20 trustee will breach its duties or not act as a prudent person
21 or not give notice if it discovers the breach. It doesn't say
22 it won't take any action. Same with the -- there's only two
23 more.

24 The October 2010 investor notice that's discussed
25 quite a bit in the briefs, Deutsche falsely states in its

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1 brief, at pages 22 and 23 of the Commerzbank brief, that the
2 letter expressly informed investors that if they wanted
3 Deutsche to take any action investors would have to direct the
4 trustee.

5 The letter says nothing like that, and I invite your
6 Honor to examine the evidence. The letter says exactly what
7 the default notices say, and I'm quoting from it. And it's
8 Handlin Exhibit 559, if the Court would like to see it. I
9 should have put it on a slide. I apologize. "Securitization
10 trust typically allowed the requisite percentage and principal
11 amount of securities to direct the trustee." That's it. It
12 doesn't say, again, that the trustee will not obey its
13 prudent-person duties. It does not say that the trustee will
14 not give notice when it discovers a breach. It does not say
15 that because of this robo-signing we're not going to put back
16 document-deficient loans in repurchase claims.

17 It just says what is the obvious right that investors
18 have under the PSA to direct the trustee if they choose to do
19 so. And I'd like to say one thing about that, your Honor.
20 Commerzbank and WestLB, like most investors, don't have 25
21 percent in any trust. That's why we were trying to cooperate
22 with the Gibbs & Bruns group and why we were writing the letter
23 to the trustee, because it's a way to pull back the curtain and
24 say, Have you discovered breaches? Can we have loan files?
25 Because unless you're a 25 percent investor, you don't have a

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1 right to any of that, and the record is uncontradicted that
2 when Commerzbank asked for the contact information of other
3 investors, Deutsche wouldn't give it to them.

4 THE COURT: But there's a difference between whether
5 you can force the trustee to do something and whether you have
6 knowledge that the trustee should be doing something and is not
7 doing something.

8 MR. WOLLMUTH: Right. And we, at the time, had no
9 knowledge, to use your Honor's formulation of it, that they
10 were not doing what they were supposed to do. You see, the
11 critical thing here to remember --

12 THE COURT: It's not hard to know whether the trustee
13 is bringing lawsuits or taking any other actions. You could,
14 as the saying goes, ask.

15 MR. WOLLMUTH: We did ask, is my point, and the
16 trustee was bringing lawsuits, the Fremont suit, for example,
17 which it settled in the bankruptcy court. So as far as we
18 could tell, they were working on it. And when we asked them,
19 they're not exactly forthcoming, and that's shown in the
20 record. And moreover, the question -- this is a narrow German
21 statute-of-limitations question, where actual knowledge is
22 required. It is true that a notice pleading standard doesn't
23 require facts in hand.

24 THE COURT: Or grossly negligent.

25 MR. WOLLMUTH: Or grossly negligent, but if you look

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1 at the gross negligence standard, as announced by Judge Torres
2 and Dr. Rohe, their expert, doesn't really contradict it, the
3 information that you can look at regarding trustee culpability,
4 not seller culpability, not originator, not servicer. The
5 seller is culpable for the loss, must be available to you in
6 information that is readily available and obtainable without
7 significant cost or effort. That is the German standard for
8 gross negligence, and that is off the table in this case for a
9 host of reasons.

10 And I can just tick through them very quickly, if your
11 Honor will allow me.

12 The last piece of evidence, and that's it, that they
13 present, those seven that I walked through is the allegation in
14 the complaint which your Honor already rejected.

15 Very briefly, on the gross negligence standard, does
16 not contest any of the following raised in 18 and 19 of our
17 opposition, loan- and trust-specific facts showing Deutsche
18 breaches were not in plain sight. That's the German standard.

19 Commerzbank tried to investigate the breaches on into
20 2012 and was still asking the trustee for information regarding
21 breaching loans and the availability of repurchase claims.
22 When Commerzbank reached out and other investors reached out to
23 Deutsche Bank in 2012, it still did not disclose the
24 information that was sought and would not provide certificate
25 holders information concerning the trusts at issue. No

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1 investor ever sued Deutsche Bank, who was working with
2 investors, until 2014, when PIMCO and Blackrock gave up on them
3 and sued them. Phoenix Light also sued them in 2014, and
4 Commerzbank examined those suits and sued them in 2015. They
5 couldn't have acted much faster.

6 Unless your Honor has further questions regarding
7 either standing, statute of limitations or something else, I
8 sense that I've worn out my welcome. I have more to say, but I
9 think --

10 THE COURT: No. Thank you. I have to give a break
11 for five minutes, and then I will listen to, briefly,
12 plaintiffs' motion for partial summary judgment and the
13 response. I've already indicated my overview with respect to
14 that, so I really don't need more than ten minutes a side at
15 most on the plaintiffs' motion for partial summary judgment.

16 The defendants have not had an opportunity to reply,
17 so I'll give them three minutes if there's anything that they
18 wish to say in reply on the defendants' motion for summary
19 judgment.

20 MR. WOLLMUTH: And your Honor, just on tort claims,
21 there's no effective motion against our tort claims because
22 they don't make any showing as to when they allegedly breached
23 the duties. They say they didn't breach any duties, so I have
24 a tort claim outline if your Honor would like it, but I don't
25 sense that you would.

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1 THE COURT: Thank you.

2 MR. WOLLMUTH: Does your Honor want to hear our
3 opposition on tort claims?

4 THE COURT: No. Thank you.

5 MR. WOLLMUTH: Thank you, your Honor. Thank you to
6 the Court for all the time.

7 THE COURT: No problem. I thank the lawyers. These
8 are difficult circumstances with all of the masks, and I know
9 it's difficult to argue, so thank you. See you shortly.

10 (Recess)

11 THE COURT: OK. Please be seated.

12 All right. Plaintiffs' motion for partial summary
13 judgment. Ten minutes. It's now 1:12.

14 MR. HANDLIN: Thank you, your Honor. Jay Handlin, on
15 behalf of plaintiffs. May it please the Court. I'm going to
16 try and limit this to three points.

17 First, the most comprehensive analysis to date of
18 events of default in an RMBS trustee case came from Judge
19 Pauley's 2020 summary judgment decision in *Commerzbank v. U.S.*
20 *Bank*. Judge Pauley found that events of default had occurred
21 in every trust in that case. He held events of default were
22 triggered under six different theories:

23 Exceeding numerical thresholds;

24 Downgrades of servicer or master servicer ratings;

25 Late or missing compliance documents;

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1 Failure to maintain REO properties by the servicers;
2 False servicer certifications; and
3 Servicers' and master servicers' disclosures of
4 noncompliance in their annual compliance document.

5 THE COURT: Could I ask you, even if I agreed that
6 events of default had occurred and were not declared, in order
7 to find liability, I would have to find that the events of
8 default were material, and that after the event of default the
9 trustee failed to act as a prudent person. Unless I found all
10 of those steps, you would not be entitled to summary judgment,
11 even on the issue of liability, putting aside the issue of
12 damages. Isn't that right?

13 MR. HANDLIN: If I can --

14 THE COURT: That's a simple question. Yes or no?

15 MR. HANDLIN: I would say no as to the second part,
16 and I'd like to explain why.

17 THE COURT: The question was you would not be entitled
18 to summary judgment on liability. Yes or no?

19 MR. HANDLIN: Your Honor stated three things, three
20 parts to establish liability, and respectfully, I think there's
21 a flaw in the second part, as stated. So I think you've set a
22 threshold that's not needed to be met to establish liability.

23 THE COURT: OK. Go ahead.

24 MR. HANDLIN: And that is what you said about
25 materiality. And Deutsche Bank talks about this throughout as

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1 requiring a material breach by servicers to trigger an event of
2 default. The clauses in none of these contracts require a
3 material breach. It doesn't require a breach at all. It's a
4 failure to observe or perform in any material respect any
5 obligation.

6 THE COURT: Doesn't that turn on the interpretation of
7 the governing agreement and the question of whether they were
8 unambiguous as a matter of law? It would be unusual to have an
9 agreement among sophisticated parties that any failure, even if
10 not material, is a breach of the agreement. But let me put
11 that aside for a moment.

12 It's true, is it not, that you couldn't get liability
13 without showing that, after the event of default, the trustee
14 failed to act as a prudent person?

15 MR. HANDLIN: Absolutely.

16 THE COURT: First of all, there's no requirement,
17 under Rule 56, that I even entertain a motion for summary
18 judgment that doesn't ask me to issue summary judgment on any
19 claim. What you're asking me to do is to provide assistance to
20 the parties for purposes of possible settlement, as I suggested
21 to your colleague not so -- well, quite a while ago -- to
22 assist by deciding parts of claims. But that's not within a
23 Rule 56 motion for summary judgment, where I would grant
24 judgment, even limited to liability. Isn't that right?

25 MR. HANDLIN: Your Honor, if I understand the rules of

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1 summary judgment, I think your Honor could order judgment as to
2 liability and leave the question of damages if your Honor --

3 THE COURT: No, no, no. But if I accept all of your
4 arguments, you don't get a judgment even on liability unless I
5 decide the issues of fact as to whether the trustee acted as a
6 prudent person. Right?

7 MR. HANDLIN: Yes, but if I could have one minute to
8 try and explain why I think you can do that.

9 THE COURT: Sure. You have five more.

10 MR. HANDLIN: OK. So Deutsche Bank says, and your
11 Honor apparently believes up until now, that whether the
12 trustee acted prudently is necessarily a question of fact. As
13 Judge Mukasey wrote in *LNC*, sometimes prudence will dictate
14 one -- and only one -- course. But the important point here is
15 there is a floor for prudence, an absolute minimum requirement,
16 and a trustee that has not done that minimum cannot have been
17 prudent, and that floor is deliberation.

18 Faced with an event of default, the trustee must
19 deliberate about how to respond to it. It may decide that the
20 response is to do nothing, but it has to decide. If it doesn't
21 deliberate at all, as a matter of law, it cannot have been
22 prudent. So for example, a trustee that denies that events of
23 default ever occurred necessarily did not deliberate in
24 response to them because it says it never happened, I don't
25 have to think about this.

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1 So if, in fact, events of default occurred and the
2 trustee didn't deliberate about them, it cannot have been
3 prudent. The undisputed facts prove Deutsche Bank did not
4 deliberate, and having not declared events of default, didn't
5 deliberate. We know -- so where events of default occurred,
6 Deutsche Bank did nothing differently, we know that because
7 they told us that across the board.

8 Why did they do nothing differently? Because their
9 trust administrators, the people who ran these trusts day to
10 day, who dealt with the servicers day to day and the team
11 leaders who supervised that entire group, their 30(b)(6)
12 witness, Mr. Reyes, did not know they had a
13 post-event-of-default duty that was higher than it was before.
14 If you don't know that you have a heightened standard to
15 satisfy, necessarily you didn't deliberate to figure out what
16 to do to satisfy it. So what do they say that they did to
17 satisfy it?

18 They say they consulted with counsel. Now your Honor
19 remarked earlier, I think, during Mr. Biron's argument that
20 they consulted internally, but if we look at exactly what they
21 said, they said they consulted with counsel. And respectfully,
22 your Honor, I don't think they get to say that, because on June
23 27, 2018, Deutsche Bank waived the advice-of-counsel defense.
24 They waived it because they didn't want to disclose those
25 communications. If they're going to say I was prudent because

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1 I consulted with counsel, we are entitled to the substance of
2 those communications, because it is entirely possible they may
3 have consulted with counsel and counsel may have said to them,
4 You need to take action, and they may have said, Well, I'm not
5 going to do that.

6 So the substance of the communication might actually
7 prove that they were imprudent. The simple fact of talking to
8 lawyers about something doesn't automatically make them
9 prudent. But we asked for those communications. They didn't
10 want to turn them over, so they waived advice of counsel. So
11 they should not now get to rely on that to say, Oh, we were
12 prudent because we talked to counsel.

13 What else did they say they did?

14 They filed proofs of claim and they commenced
15 litigation. They filed proofs of claim with respect to 38
16 trusts, commenced lawsuits with respect to six trusts, two of
17 them overlapping with the proof-of-claim trusts. That's 42
18 trusts. 43 trusts there is nothing else that they say they
19 did. That is not deliberate -- that is an admission of no
20 deliberation as to those 43 trusts, including 18 trusts where
21 they declared events of default.

22 THE COURT: Why does that follow? They took actions
23 with respect to various trusts and they didn't take actions
24 with respect to various other trusts.

25 MR. HANDLIN: But again, we asked in discovery and in

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1 the papers, what did you do in response to events of default,
2 and they said we consulted with counsel, we filed proofs of
3 claim and we commenced litigation.

4 THE COURT: Would you finish up.

5 MR. HANDLIN: Sure.

6 So as to trusts where they didn't file proofs of claim
7 and they didn't commence litigation, the only thing they have
8 said is they consulted with counsel in response to events of
9 default. But again, having waived that, I think they are
10 estopped from arguing it. If you had a list of things, I think
11 that gets erased off your list, leaving them, as to those 43
12 trusts, literally nothing that they have done in response. And
13 since your Honor is asking me to stop, I will stop here.

14 And by the way, I just want to acknowledge for both
15 sides we know these cases have been an enormous burden because
16 of the amount of trusts, the amount of proof, so I just want to
17 thank your Honor for the heavy lifting.

18 THE COURT: All right. Thank you.

19 Ten minutes with respect to the plaintiffs' motion for
20 summary judgment.

21 MR. KRAUT: Yes, your Honor. And I'll start by
22 joining Mr. Handlin in thanking the Court for working through
23 this with us.

24 We agree with your Honor's point that what the
25 plaintiffs are seeking here is not appropriate for summary

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1 judgment. It's an advisory opinion on certain provisions, and
2 we believe that that's not appropriate here.

3 In terms of whether prudence can be granted at this
4 stage, as I mentioned earlier, the defendants identified four
5 or five, six cases in our briefs showing that it's not an issue
6 here. The *LNC* case that Mr. Handlin cited is literally the
7 only case that plaintiffs cited on this point, and what the
8 court said in that case was that determinations of
9 reasonableness and prudence are fact-intensive and, as a
10 result, talking about Judge Mukasey, denied the investors'
11 motion for summary judgment. So even a case that they cite for
12 their point doesn't hold up there.

13 In terms of evidence of deliberation, plaintiffs point
14 to Ronaldo Reyes's testimony. They don't point to Kelly
15 Rodriguez's testimony, and this is significant because Kelly
16 Rodriguez was in the trust management group. Ronaldo Reyes was
17 not. Ronaldo Reyes was a team leader of the trust
18 administration group. Ronaldo Reyes's job didn't change very
19 much before and after an event of default.

20 Kelly Rodriguez would be a person who would be
21 involved in this, and when she was asked --

22 THE COURT: Hold on. The plaintiffs are right,
23 though, with respect to the fact that you can't rely upon the
24 fact that your clients consulted counsel as part of the defense
25 or as a means of showing that you acted prudently, isn't that

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1 right?

2 MR. KRAUT: I would disagree, your Honor, for two
3 reasons.

4 One is there's a case, *CFIP v. Citibank*. I recall it
5 because I was involved in it, your Honor, and in that case,
6 Judge Rakoff concluded that when considering whether a trustee
7 acted in good faith, the fact that it considered -- that it
8 consulted with counsel as part of its process had value for
9 that purpose. I know that there are other courts that have
10 ruled on that issue, but my main point would be --

11 THE COURT: No, no. Why is that right? If you want
12 to rely upon the fact that you consulted with counsel, then you
13 decide to waive the confidentiality that otherwise applies to
14 that conversation. But you have affirmatively decided not to
15 waive the protection of the attorney-client privilege, so how
16 can you rely on the fact that you consulted with counsel?

17 MR. KRAUT: I would say as to that case, your Honor,
18 Judge Rakoff held that there's a difference between advice
19 relying on exculpation for good faith, acting in good faith and
20 reasonable versus advice of counsel, and because the trustee
21 chose not to rely on advice of counsel, like we are not relying
22 on advice of counsel, it would not consider that exculpation,
23 but in that case the court considered it.

24 THE COURT: What's the name of Judge Rakoff's case?

25 MR. KRAUT: *CFIP v. Citibank*. It's from 2010.

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1 But the main point I want to make on this issue, your
2 Honor, is that if the Court decides that it won't consider that
3 the trustee consulted with counsel -- and the testimony is full
4 of references to that, where Kelly Rodriguez said she talked
5 with counsel on a regular basis, we consulted with counsel on
6 all events of default -- I don't think that means that
7 plaintiffs get to stand up and say that the trustee did
8 nothing. It's one thing to say we can't rely on the advice,
9 but they don't get to stand up and say we did nothing by
10 reading out of all process is an important step in the process.
11 And this is their motion for summary judgment, and they're
12 saying we did nothing, and I don't think they get to go that
13 far.

14 Mr. Handlin says that as to the trusts for which
15 Deutsche Bank does not acknowledge an event of default, that
16 is -- I don't think this was his term; I'll use it -- *per se*
17 evidence that there was no prudent-person standard met. But if
18 you look at what the trustee actually did in those instances,
19 even if they did not notice an event of default and believe
20 their own prudent-person standard, what the trustee did in most
21 instances, I believe, would meet the prudent-person standard.

22 When there was a servicer attestation of compliance
23 that was late, they had a policy and procedure where they would
24 follow up and go get it. What would a prudent person do who is
25 expecting a certificate that hasn't come in? They'd go get it.

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1 If a prudent person heard media allegations of
2 robo-signing, what might they do? They might write to the
3 servicers. The plaintiffs' slide deck includes a letter, and
4 they say that the trustee reached out to servicers to try to
5 get information about this. That supports our case, not
6 theirs. It also shows that the trustee didn't have trust- and
7 loan-specific evidence of breaches, because it wouldn't have
8 sent the letters. It sent the letters to learn them, to
9 identify them.

10 So if you look at what the trustee did in each of
11 these instances, when you have instances like the plaintiffs
12 identified about property maintenance, what would a prudent
13 person do there? They identified the property violations to
14 the servicer by keystroking their own systems. They let the
15 servicers know about them. They met with municipalities to try
16 to put the servicers in touch with the, the servicers in touch
17 with the cities. They ultimately sent notices to holders to
18 let them know about notices that they had sent to servicers.

19 So where prudence is an issue of fact, even as to the
20 disputed events of default, for lack of a better term,
21 plaintiffs can't get summary judgment by saying that the
22 trustee necessarily did nothing in those situations.

23 How am I doing on time?

24 THE COURT: All right.

25 MR. KRAUT: I think that's a good place to stop, your

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1 Honor.

2 THE COURT: OK. I said I would let the defendants
3 have a reply for three minutes. Even though your colleague
4 graciously ceded back three minutes, go ahead.

5 MR. BIRON: Thank you, your Honor.

6 A few points.

7 First of all, on the lack of standing as to sold
8 certificates, plaintiffs' counsel represented that Commerzbank
9 knew the location of the buyer, of the actual buyer. That's
10 incorrect. In Commerzbank's interrogatory response, which is
11 at our Commerzbank 56.1 --

12 THE COURT: No, they said they didn't know.

13 MR. BIRON: Correct. They didn't know who the actual
14 buyer was. They admitted that at paragraph 44.1 of the 56.1
15 statement.

16 Second of all, with respect to DTC's involvement, it
17 is equally important under the center-of-gravity test. Among
18 the other factors courts consider is the place of performance
19 and location of the subject matter.

20 Here, the certificates were registered to the DTC,
21 which is located in New York, which means, as Judge Pauley
22 found, that's the location of the subject matter. Moreover,
23 the sale and the transfer occurred on the DTC's books, which is
24 in New York. That's the place of performance.

25 Next, with respect to the loan-by-loan trust-by-trust

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1 point, there was some discussion that it only relates to
2 liability. That is incorrect. It's an incorrect statement of
3 the law, and I'll quote from Judge Caproni in *Phoenix Light v.*
4 *Bank of New York*, this court joins -- let me start again, your
5 Honor. "This court joins other courts in this district in
6 holding that plaintiff's lack of loan- or trust-specific proof
7 relative to Bank of New York-Mellon's knowledge of any breach
8 is fatal to their claims."

9 Again, your Honor, the loan-by-loan proof relates to
10 whether or not the trustee was put on notice and had knowledge
11 of a loan-specific breach, and that is not a phase 2 issue.

12 With respect to the document-defect claims, I'd just
13 refer your Honor to our reply brief, starting at page 26, which
14 sets forth the record and makes clear that what we moved on on
15 our motion to dismiss is for any repurchase claim related to a
16 document defect identified in the final exception report
17 delivered at or near the closing of the transaction. And your
18 Honor, I respectfully submit that's the motion that you
19 granted, and those claims are of this case. And they're not
20 revived by 2 percent letters that were sent later that
21 identified, at most, that those document defects continued. If
22 that duty was breached, it was breached the first time the
23 final exception report was received.

24 Finally, the German statute of limitations, with
25 respect to the point about Phoenix Light, that there was no

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1 trust, that's incorrect. It's clear, and I refer your Honor to
2 page 17 of our moving brief, that Phoenix Light transferred the
3 certificates to the indentured trustee, and the language in the
4 agreement is Phoenix Light transfers/grants, "All of Phoenix's
5 rights, title and interest in and to the asset portfolio
6 whether now owned or existing hereafter arising or acquired."
7 That's at exhibit 96 to our -- it was submitted in connection
8 with our summary -- I'm sorry, with our Phoenix Light summary
9 judgment motion.

10 The Second Circuit has held that such clauses effect a
11 complete transfer to an indentured trustee, and thus, any
12 claims relating to the RMBS certificates in securitized asset
13 portfolio are held by the indentured trustee in trust for the
14 trust beneficiaries.

15 I will cite to two Second Circuit cases.

16 THE COURT: Finish up.

17 MR. BIRON: The first one is *NCUA v. U.S. Bank*, 898
18 F.3d 243, pin cite 253.

19 The other case is affirming a lower court decision.
20 It's the *Triaxx v. Bank of New York-Mellon* case, and the
21 citation is 741 F.App'x 751.

22 The last point I would like to make --

23 THE COURT: I said finish up.

24 MR. BIRON: OK.

25 Between knowledge of factual circumstances and coming

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1 up with a legal theory, there's a difference, and the idea that
2 because plaintiffs did not come up with a legal theory that
3 they could pursue claims against a trustee is in any way
4 relevant to the German statute of limitations analysis is
5 completely incorrect.

6 Thank you, your Honor.

7 THE COURT: OK. Thank you, all. I'll take the
8 motions under advisement. I appreciated the arguments,
9 particularly under the difficult circumstances, and I thank the
10 reporter for all of the time.

11 All right. Be well. Stay healthy.

12 (Adjourned)